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On inter-state litigation and armed conflict cases in Strasbourg

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Abstract: The reluctance of Council of Europe member states to challenge each other at the bar of Europe, through the litigation of inter-state cases at the European Court, used to be a regular feature of the Strasbourg system. However, conflicts of different kinds in eastern Europe have led to a surge of such cases in recent years, as well as the introduction of thousands of related individual applications. The serious challenges presented, in particular by conflict-related cases, have led some commentators to question whether they can feasibly remain part of the Strasbourg process. For others, the focus should rather be on how such cases can more effectively processed and assessed.

This article emphasises the significance of both inter-state cases in general, and of cases arising from armed conflict (including individual applications): their political and legal importance; their centrality to the European human rights system; and how vital they are for individual victims of human rights violations. It analyses a number of controversial or challenging aspects of the adjudication of these cases, and puts forward some proposals for reform.

Keywords: European Court of Human Rights - Inter-state cases – armed conflict - evidence

1 Introduction

The catastrophic renewal of armed conflict in September 2020 between Armenia and Azerbaijan, over the region of Nagorno-Karabakh, is likely to have affected hundreds of thousands of people in the region.¹ The European Court of Human Rights (the Court) was swiftly seized of the issue, through interim measures applications lodged by both Armenia and Azerbaijan. In addition to inter-state litigation, there is the potential too for thousands of individuals to seek redress at the Court, adding further pressure on an institution which continues to labour under a very substantial body of pending cases.² The reluctance of Council of Europe member states to challenge each other at the bar of Europe, through the litigation of inter-state cases at the Court, used to be one of the features of the Strasbourg system. However, conflicts of different kinds in eastern Europe have led to a marked increase of such cases in recent years, as well as the introduction of thousands of related individual applications. These cases have further expanded the Court's already sizable docket, placing the system under considerable additional strain.

For some observers, this has raised questions about the Court's ability to handle such cases, or the desirability of it doing so, given the difficulties that these cases can pose. For example, the former European Court Registrar, Erik Fribergh, advised Government representatives on the Steering Committee for Human Rights that 'the Court is ... not equipped to deal with large scale abuses of human rights. It cannot settle war-like conflicts between States.'³ On the other hand, former judge, Egbert Myjer, has argued that the Court should continue to adjudicate cases post armed conflict, as 'to fail to do so would be a sad dereliction of its duty to humanity'.⁴ The Strasbourg organs have themselves been criticised for the ways in which they handle inter-state litigation. Writing in 1994, and analysing inter-state cases brought against Greece, the UK and Turkey, Kamminga argued that 'the European system's record in dealing with gross and systematic violations has been decidedly less impressive' when compared with individual applications.⁵ Nevertheless, the state parties to the European Convention on Human Rights (the Convention) have continued to affirm the Court's remit in such situations. For example, in 2015 the Steering Committee for Human Rights ventured as regards large-scale violations that '[t]he Court has a pivotal role in this domain and is equipped to examine large-scale abuses of human rights...'.⁶

Important questions also arise as to how such cases impact upon relations between states, and on the wider international polity. Leckie has described inter-state applications as 'one of the most drastic and

¹ See, for example, Statement by Martin Schuepp, ICRC Eurasia Regional Director, Geneva, October 13 2020, <<https://www.icrc.org/en/document/statement-martin-schuepp-icrc-eurasia-regional-director-geneva-october-13>> accessed 16 October 2020.

² As at 31 October 2020, the number of pending cases was 61,250. See the Court's statistics: <https://www.echr.coe.int/Documents/Stats_pending_month_2020_BIL.PDF>.

³ P Leach, 'Thawing the Frozen Conflict? The European Court's Nagorno-Karabakh Judgments' (*EJIL: Talk!*, 26 July 2015): <<https://www.ejiltalk.org/thawing-the-frozen-conflict-the-european-courts-nagorno-karabakh-judgments/>>.

⁴ E Myjer, 'The European Court of Human Rights and armed conflicts between high contracting parties: some general remarks' in P Titun (ed.), *Mélanges en l'honneur de Jean-Paul Costa, La conscience des droits* (Dalloz 2011), 461, 472.

⁵ M Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' (1994) 12(2) *Netherlands Quarterly of Human Rights* 153, 154.

⁶ Report of the Steering Committee for Human Rights, 'The longer-term future of the system of the European Convention on Human Rights', 11 December 2015, para 88.

confrontational legal measures available to states'.⁷ Confrontational, certainly, but arguably they are also affirmative of the validity of the notion of the rule of international law. As Leckie has argued,

...implementation of the inter-state complaint can raise a dispute between two or more states to a legal level rather than leaving the issue at a political, economic, or strategic level. The consideration of a case(s) by an independent body may assist in decreasing the level of tension between the states concerned, as well as increasing the level of protection of human rights.⁸

Reflecting on the development of the role of the Court in 1996 (with reference to the inter-state procedure), Rolv Ryssdal, the former Court president, underlined the importance of maintaining a collective guarantee:

...it adopted the principle of the collective enforcement of human rights. It recognised that the surest means of preventing a recurrence of the abuses of the 1930s and 1940s was for States to submit to a form of external scrutiny which encroached on their hitherto reserved domain.⁹

This article seeks to analyse selected areas and issues which arise in the context of inter-state litigation (it does not of course purport to be comprehensive).¹⁰ The over-arching aim is to emphasise the significance of both inter-state cases in general, and of cases arising from armed conflict (including individual applications): their political and legal importance; their centrality to the European human rights system; and how vital they are for individual victims of human rights violations. In light of that, the article considers the ways in which the Court's processing and adjudication of them could be enhanced, including in particular by improving the assessment of evidence.

It opens by proposing a broad typology of inter-state cases and provides statistics on their numbers and those of related individual applications. The discussion is set in the context of the ongoing state-led debates over the reform of the Court, including the proposal made in the first draft of the Copenhagen Declaration in 2018 to establish separate mechanisms to handle inter-state and conflict cases. There follows analysis of a number of controversial or challenging aspects of the adjudication of these cases, including the collection and assessment of evidence, fact-finding hearings, the use of technology and the excessive length of time taken to process them. It also tackles problems created by states' non-cooperation and their use of politicised arguments, as well as the failure to disclose crucial documents, and, conversely, the presentation of voluminous documentation. The article discusses key admissibility and substantive law developments including the Court's assessment of what constitutes an administrative practice and how the notion of a state's jurisdiction has been refined. There is consideration of the utility of applying interim measures in conflict situations and the prospects of concluding friendly settlements in inter-state cases. Finally, aspects of restitution and implementation are discussed, before proposals for reform are put forward.

2 A typology of Inter-state Cases

⁷ S Leckie 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10(2) *Human Rights Quarterly* 249, 254.

⁸ Ibid 256.

⁹ R Ryssdal, 'The coming of age of the European Convention on Human Rights' (1996) 1 *European Human Rights Law Review* 18, 18.

¹⁰ For example, the article does not address the issue of derogation or the application of international humanitarian law, both of which have been extensively addressed in the literature (see, for example, D Murray (ed.), *Practitioners' Guide to Human Rights Law in Armed Conflict* (OUP, 2016); P Kempees, "'Hard Power" and the European Convention on Human Rights', (PhD Thesis, Leiden University 2019)).

The inter-state process has hitherto been very rarely used, although there has been something of an upturn in recent years, as discussed further below, and indeed other forms of inter-state challenge also appear to be more recently in vogue.¹¹ Article 33 of the Convention provides a mechanism for any state party to require another state party to account for its actions, or inactions, through an international legal procedure at the Court. The mechanism combines elements of a collective human rights enforcement procedure and an international dispute settlement process, which can both address large-scale human rights issues and safeguard individuals' rights.¹² In one of the earliest inter-state applications, the European Commission of Human Rights (the Commission) characterised it as 'an action against an alleged violation of the public order of Europe'.¹³

As regards their subject matter and overriding purpose, inter-state applications can be very different creatures. It is suggested that there are five categories of inter-state and related cases.¹⁴ The first, and predominant, category concerns cases which are taken in the context of a particular conflict or political dispute, or other political differences, between states. Examples of such cases include two applications brought by Greece against the UK in the 1950s (the very first inter-state cases), relating to its colonial rule over Cyprus and its treatment of the Cypriot resistance movement (including the deportation of Archbishop Makarios to the Seychelles Islands and the use of the death penalty and corporal punishment),¹⁵ and a series of cases lodged by the Government of Cyprus following Turkey's military operations in northern Cyprus in 1974 and as a response to its continuing occupation of that territory and its proclamation of the 'Turkish Republic of Northern Cyprus' in 1983. Other examples include the case of *Ireland v the United Kingdom*¹⁶ which concerned the 'five techniques' of interrogation used by the British security forces in relation to detained IRA suspects in Northern Ireland, and the case brought by Georgia against Russia as a result of mass arrests, detentions and deportations of thousands of Georgians in 2006–2007.¹⁷ Moreover, both Georgia and Ukraine have brought a series of cases against Russia in recent years, arising directly out of armed conflict or situations of occupation on their territories.

Where states take steps to represent the interests of individual nationals (which commentators have compared to a form of diplomatic protection),¹⁸ this represents a second, and much rarer, category of inter-state application. One example is the case of *Denmark v Turkey*¹⁹ in which the applicant state sought to obtain a remedy for Kemal Koç, a Danish national who alleged that he had been tortured by Turkish police when he returned from Denmark to Turkey for his brother's funeral. Mr Koç was

¹¹ See, for example, G Ulfstein and I Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' (*EJIL: Talk!*, 24 January 2020): <<https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/>>.

¹² As is discussed by Isabella Risini in her invaluable study of inter-state cases: I Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (BRILL 2018). See, in particular, her overview and analysis of the inter-state cases in chapter 4. See further: J Alvarez, 'What are International Judges for? The Main Functions of International Adjudication' in Cesare P Romano, K Alter, Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013). See also H Küchler, *Die Renaissance der Staatenbeschwerde - Potenzial und Gefahr der vermehrten Nutzung des Art. 33 EMRK* (Nomos 2020).

¹³ *Austria v Italy* 788/60 (ECmHR, dec, 11 January 1961).

¹⁴ See also the comparable, but narrower, typology proposed in Leckie (n 7), 256.

¹⁵ *Greece v the United Kingdom* (I) 176/56 (ECmHR, report, 26 September 1958); *Greece v the United Kingdom* (II) 299/57 (ECmHR, report, 8 July 1959). For a detailed analysis of these two cases, see A Simpson, *Human Rights and the End of Empire – Britain and the Genesis of the European Convention* (OUP 2001), chapters 18 and 19.

¹⁶ *Ireland v the United Kingdom* 5310/71 (ECtHR, 18 January 1978).

¹⁷ *Georgia v Russian Federation* (I) [GC] 13255/07 (ECtHR, 3 July 2014).

¹⁸ W Schabas, *The European Convention on Human Rights – A Commentary* (OUP 2015) 725.

¹⁹ *Denmark v Turkey* 34382/97 (ECtHR, 5 April 2000).

detained at the airport on his arrival and was then held by the police, and interrogated about his connections to the PKK. He complained, amongst other things, of having been blindfolded, stripped naked, subjected to a high-pressure jet of cold water, beaten and that the police threatened to throw him out of the window of the building. A second example is the case of *Austria v Italy*,²⁰ in which the applicant Government sought to uphold the right to a fair hearing of six members of the German-speaking minority population of South Tyrol (albeit Italian nationals) who were prosecuted for murder.²¹

A third category, also regrettably uncommon, reflects the potential for states to operate a more general 'policing' role, as is illustrated by the *Greek case*.²² There, the Governments of Denmark, Norway, Sweden and the Netherlands brought two applications alleging that the Greek Government had violated the Convention as a result of a series of administrative and legislative measures that had been taken following the military *coup d'état* in April 1967, leading to mass internment, torture, trials before extraordinary courts martial and media censorship. A second example is the case of *Denmark, France, Norway, Sweden and the Netherlands v Turkey*, which was lodged following the declaration of martial law in Turkey in the early 1980s.²³ The former Dutch Foreign Minister, Max von der Stoel, has commented that it was an important aspect of such cases that several states decided to act collectively.²⁴

In addition, this typology would be incomplete without the inclusion of two other types of related cases, even though they are individual cases brought under Article 34 of the Convention, rather than inter-state cases under Article 33, as such. The fourth tier in this categorisation are individual applications the object and/or outcome of which is very important to states, so much so that they may intervene as third parties. One example is the case of *Loizidou v Turkey*,²⁵ concerning the loss of the applicant's plots of land in northern Cyprus, following the Turkish invasion in 1974. It was originally lodged with the Commission, before being referred on to the Court by the Cypriot Government, which participated thereafter as the 'applicant Government'. Further examples of this category include the cases brought by individual refugees and internally displaced persons (IDPs) who lost their homes, land and property during the conflict between Armenia and Azerbaijan over the territory of Nagorno-Karabakh in the early 1990s. Both states cross-intervened in the cases of *Chiragov v Armenia*²⁶ and *Sargsyan v Azerbaijan*²⁷ which were studiously processed in parallel by the Court, leading to Grand Chamber judgments in 2015.²⁸

Finally, the fifth category comprises individual applications which arise out of matters which are also the subject of 'parallel' inter-state cases, whether submitted prior or subsequent to the inter-state

²⁰ *Austria v Italy* (n 13).

²¹ As Risini discusses, one notable aspect of the case was that at the time, Italy had not yet accepted the right of individual petition (Risini (n 12) 77-83).

²² *Denmark, Norway, Sweden and the Netherlands v Greece* 3321/67, 3322/67, 3323/67 and 3344/67 (ECmHR, report, 5 November 1969).

²³ *Denmark, France, Norway, Sweden and the Netherlands v Turkey* 9940-9944/82 (ECmHR, report, 7 December 1985).

²⁴ Leckie (n 7) 295.

²⁵ *Loizidou v Turkey* (Preliminary Objections) [GC] 15318/89 (ECtHR, 23 March 1995).

²⁶ *Chiragov and Others v Armenia* [GC] 13216/05 (ECtHR, 16 June 2015).

²⁷ *Sargsyan v Azerbaijan* [GC] 40167/06 (ECtHR, 16 June 2015).

²⁸ These cases have been described by Michael O'Boyle and Natalia Brady as 'quasi inter-state cases' (M O'Boyle and N Brady, 'Investigatory Powers of the European Court of Human Rights' (2013) *European Human Rights Law Review* 378, 389 (n 63)) and by Marko Milanovic as 'interstate cases by proxy' (M Milanovic, 'The Nagorno-Karabakh Cases' (*EJIL:Talk!*, 23 June 2015): <<https://www.ejiltalk.org/the-nagorno-karabakh-cases/>>).

application. For example, a number of the situations of European conflict have resulted in both inter-state applications and applications lodged on behalf of individual victims (sometimes in their thousands), as illustrated and discussed further below.²⁹

In any analysis of inter-state cases, these fourth and fifth categories need to be considered alongside them, because they are so closely inter-related. The Court's handling of the inter-state cases will impinge considerably on its processing of connected individual cases, not least by delaying them, often by periods of several years, and also more substantively, by pre-deciding essential questions of admissibility or merits. The same could be true of the impact of some individual applications on inter-state cases.

3 Inter-state Cases – the Numbers

It is worth dwelling firstly on the statistics, both historic and current, which show the predominance of armed conflict as being the cause of the majority of inter-state applications, as well as revealing the very high numbers of individual cases which are linked to them.³⁰ Although only 15 inter-state cases have ever been resolved by the European Commission and Court of Human Rights, 7,529 individual cases linked to the inter-state cases have been dealt with. That number can be broken down into separate theatres of conflict: 2,851 relating to the 2008 South Ossetia conflict (the 'eight day war') between Georgia and Russia; 2,357 concerning the conflict which commenced in 2014 between Russia and Ukraine; 1,715 relating to the long-standing dispute between Cyprus and Turkey; 497 from the Nagorno-Karabakh conflict (Armenia and Azerbaijan); and 109 resulting from the Transdniestrian situation.³¹

As regards the present situation, at the time of writing there were 14 inter-state cases pending at the Court. Recent years have seen an upsurge – 17 inter-state applications have been lodged since 2007. That figure is larger than the total number of inter-state cases lodged between 1956 and 1997.³² The majority of these more recent cases are conflict-related. Six applications have been brought by Ukraine against Russia concerning events in Crimea and eastern Ukraine.³³ One such application was lodged in 2018 concerning 24 members of the Ukrainian Navy captured in the Sea of Azov and the Kerch Strait in November 2018.³⁴ In addition, in July 2020 the Netherlands lodged a case against Russia relating to the shooting down of Malaysia Airlines Flight MH17 over eastern Ukraine in July 2014,

²⁹ See for example Brice Dickson's discussion of *Ireland v the United Kingdom* and the related cases of *Donnelly and Others v the United Kingdom* (brought by individuals claiming to have been victims of abuse in detention) in which he highlights the disparity between the inadmissibility outcomes in the individual cases and the finding of torture by the Commission in the inter-state case: B Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP 2010) 142-153.

³⁰ These statistics have been extracted from: Steering Committee for Human Rights, Drafting Group on Effective Processing and Resolution of Cases Relating to Inter-state Disputes, DH-SYSC-IV(2020)04, 8 July 2020, <<https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/16809f059e>>.

³¹ *Ibid.*, para 14. Many of these cases have been struck out or otherwise dismissed without having been considered on the merits.

³² See the table of inter-state cases published by the European Court: <https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf>.

³³ One of the cases (*Ukraine v Russian Federation* (III) 49537/14 (ECtHR, dec, 1 September 2015)) was struck out in September 2015. It concerned the deprivation of liberty and ill-treatment of a Crimean Tatar (a Ukrainian citizen). The applicant government indicated that it did not wish to pursue the application as there was an individual application pending before the Court raising the same issues.

³⁴ European Court of Human Rights, Press Release, 'ECHR puts questions to Russian Government after receiving new inter-State case from Ukraine concerning events in the Sea of Azov', 30 November 2018.

which led to the death of 298 people, including 196 Dutch nationals.³⁵ There have been four inter-state applications brought by Georgia against Russia, three of which relate to the 2008 conflict between the two countries. One of these cases, *Georgia v Russian Federation* (III), relating to the detention of four Georgian children in the Tskhinvali-South Ossetia region, was struck out in 2010 after the children's release. The first *Georgia v Russian Federation* inter-state application was not conflict-related, as such, but followed Georgia's expulsion of Russian diplomats from Tbilisi, and concerned the mass expulsion of Georgian nationals from Russia in Autumn 2006. Two applications, brought by Armenia against Azerbaijan and Turkey, and a third, brought by Azerbaijan against Armenia, followed the outbreak of hostilities over Nagorno-Karabakh in September 2020.³⁶ Another inter-state case was lodged by Liechtenstein in August 2020 against the Czech Republic, concerning an issue arising amidst conflict - property confiscations following the Second World War. The case brought by Slovenia against Croatia in 2016 relates to a large number of legal claims arising after the dissolution of the former Yugoslavia.³⁷

There is also a considerable weight of individual cases connected, or related, to inter-state cases, currently pending at the Court. At the beginning of 2020, there were more than 8,800 individual applications pending before the Court arising out of situations of inter-state conflict (15% of the total of pending cases). In terms of individual applications, as at February 2020 there were 6,490 cases pending at the Court relating to the conflict in eastern Ukraine and Crimea. Of that number, 5,590 cases concerned eastern Ukraine (4,500 cases against Ukraine, 40 against Russia and 1,050 applications lodged against both states). There were 900 cases relating to Crimea (770 against Russia, 10 against Ukraine and 120 applications against both countries).³⁸

As regards the South Ossetia conflict, more than 3,300 cases were initially lodged against Georgia. Of those, 1,554 were struck out in 2010 (applicants no longer wishing to pursue their cases) and 906 were declared inadmissible in 2018-2019. By July 2020, there were 435 cases pending against Georgia (21 of which complain of violations by both Georgia and Russia). There were 176 applications against Russia (by February 2020), 170 of which (concerning 845 applicants) had been communicated to the Russian Government.³⁹

There were also 1,710 pending applications related to the Nagorno-Karabakh conflict (as at February 2020) – 1,054 against Armenia and 655 against Azerbaijan. That total number was made up of the following: 1,110 cases concerning the applicants' inability to return to their homes and property⁴⁰ (608 - Armenia and 502 – Azerbaijan); 562 cases of damage to, or destruction of, property, or the killing of

³⁵ European Court of Human Rights, Press Release, 'New inter-State application brought by the Netherlands against Russia concerning downing of Malaysia Airlines flight MH17', 15 July 2020. In addition, 380 family members brought individual applications against Russia in 2016 and 2018 (*Ayley and Others v Russian Federation* 25714/16 and 56328/18), and a number of suspects are being prosecuted in absentia under Dutch law. See: A Buyse, 'The Netherlands Lodges Inter-State Complaint Against Russia' (*ECHR Blog*, 11 July 2020): <<http://echrblog.blogspot.com/2020/07/the-netherlands-lodges-inter-state.html>>.

³⁶ European Court of Human Rights, Press Release, 'The Court grants an interim measure in the case of Armenia v. Azerbaijan', 30 September 2020; European Court of Human Rights, Press Release, 'The Court's decision on the request for an interim measure lodged by Armenia against Turkey', 6 October 2020; European Court of Human Rights, Press Release, 'Request for interim measures lodged by Azerbaijan against Armenia concerning the conflict in Nagorno-Karabakh', 27 October 2020.

³⁷ European Court of Human Rights, Press Release, 'European Court of Human Rights receives an application brought by Slovenia against Croatia', 20 October 2016.

³⁸ Steering Committee for Human Rights (n 30) paras 16-20.

³⁹ Ibid.

⁴⁰ Circumstances which are similar to the cases of *Chiragov and Others v Armenia* (n 26) and *Sargsyan v Azerbaijan* (n 27).

civilians (439 - Armenia and 123 - Azerbaijan); 28 cases concerning the mutilation of soldiers' bodies (5 - Armenia and 23 - Azerbaijan); and 11 cases concerning the detention and alleged torture or killing of Armenians in Azerbaijan.⁴¹

Where situations such as those in eastern Ukraine, Crimea and Nagorno-Karabakh are ongoing, more cases may be directed at the Court from time to time, especially following 'spikes' in the conflict. One example of this was the 'four day war' in April 2016 between Armenia and Azerbaijan, which led to an additional 1,057 applications being lodged with the Court.⁴² There will no doubt be further cases resulting from the hostilities renewed in the Autumn of 2020.

The close inter-connectedness of inter-state and individual applications was clearly acknowledged by the Dutch Government when commenting on its application introduced in 2020:

By submitting an inter-State application, the government is sharing all available and relevant information about the downing of Flight MH17 with the ECtHR. The contents of the inter-State application will also be incorporated into the Netherlands' intervention in the individual applications submitted by the victims' next of kin against Russia to the ECtHR. By taking this course of action the government is offering maximum support to these individual cases.⁴³

4 The Magnitude of Inter-state Cases

Although small in number, the import of inter-state cases is significant because of the highly charged political context, encompassing situations of internal conflict, declarations of martial law, *coups d'états*, belligerent occupation and armed conflict, frequently enduring over many years. The Strasbourg organs have emphasised the primacy of political resolution in such situations, for example, as regards the status of Cyprus,⁴⁴ the situation in northern Cyprus,⁴⁵ and the conflict over Nagorno-Karabakh.⁴⁶ Nevertheless, the Court has been required to provide judicial interpretation of the appropriate application of the Convention, even amidst such cataclysmic events. This has meant that the cases have raised novel questions of law and practice. Moreover, the conflict-related cases are exceptional in view of the nature, gravity and scale of the Convention violations which they address. They have established, for example, Turkey's failure to investigate the whereabouts and fate of 1,485 Greek-Cypriot missing persons who disappeared in life-threatening circumstances in northern Cyprus after 1974,⁴⁷ as well as Russia's responsibility for the collective expulsion of several thousand Georgian

⁴¹ Steering Committee for Human Rights (n 30) para 20.

⁴² Ibid para 20 (n 20).

⁴³ Buyse (n 35).

⁴⁴ In terminating the second case brought by Greece against the UK, the Commission stated: '...the achievement of a final settlement of the political problem is of the highest importance for securing the restoration of the full and unfettered enjoyment of human rights and fundamental freedoms in Cyprus'. (*Greece v the United Kingdom* (II) (n 15) 22).

⁴⁵ For example, the Committee of Ministers has stated that 'the enduring protection of human rights in Cyprus can only be brought about through the re-establishment of peace and confidence between the two communities; and that inter-communal talks constitute the appropriate framework for reaching a solution of the dispute' (Committee of Ministers, Resolution DH (79) 1, 20 January 1979).

⁴⁶ In *Sargsyan v Azerbaijan* (n 27, para 236), commenting on the negotiations carried out under the auspices of the OSCE Minsk process, the Court stated: 'While the Court can only emphasise the importance of these negotiations, it has already observed that they have been ongoing for over twenty years since the ceasefire in May 1994 and for more than twelve years since the entry into force of the Convention in respect of Azerbaijan and have not yet yielded any tangible results'.

⁴⁷ *Cyprus v Turkey* (IV) [GC] 25781/94 (ECtHR, 10 May 2001) para 136.

nationals in 2016. The cases have had significant political ramifications too, not least the very first two applications lodged in 1956 and 1957 by Greece challenging the UK's conduct (including the use of torture) in its colony, Cyprus, which led to changes in the use of emergency powers (including the ending of what the Greek Government complained of as 'whipping' and the use of collective punishments), and were followed by political negotiations leading to the independence of Cyprus.⁴⁸ The inter-state cases lodged against Greece following the 1967 *coup d'état*, and the imposition of a military dictatorship, resulted in the first finding of torture under Article 3 of the Convention (by the Commission, but not the Court) and led to Greece's denunciation of the Convention in 1969 and its formal withdrawal from it in 1970. The case of *Ireland v the United Kingdom* was also of political importance⁴⁹ and led directly to the avowed ending of the use by the UK authorities in Northern Ireland of five notorious 'interrogation techniques'.⁵⁰

Inter-state litigation, and associated individual cases, will frequently hinge on questions of considerable regional political importance and decide significant legal or jurisdictional issues. Litigation arising from northern Cyprus, including seminal individual applications such as *Loizidou v Turkey*,⁵¹ as well as a series of inter-state cases brought by Cyprus against Turkey, established the principle that state responsibility may arise where a state exercises effective control of an area outside its national territory. The two 2015 Grand Chamber judgments arising out of the Nagorno-Karabakh conflict decided different jurisdictional questions. In the *Chiragov* case,⁵² the Court concluded that Armenia had jurisdiction over events occurring within the territory of Nagorno-Karabakh, because of its effective control of the region. In *Sargsyan*,⁵³ the Court was required to assess whether Azerbaijan was still considered to exercise jurisdiction over a part of its own territory over which it claimed to have lost control, with the Grand Chamber deciding that as the village in question was situated in the internationally recognised territory of Azerbaijan, a presumption of jurisdiction applied. The Court accordingly rejected the Azerbaijani Government's argument that a state's responsibility should be limited in disputed zones and inaccessible areas.⁵⁴

They have also been determinative of important principles of the Court's evolving practice. It was in the case of *Ireland v the United Kingdom* that the Court first set out its principal approach to the burden of proof – that neither the applicant nor respondent carries the burden of proof as such; instead, the Court's analysis of the evidence requires it to examine 'all the material before it'. In the same judgment, the Court asserted its 'complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it'.⁵⁵

A common feature of inter-state cases is the claim that the respondent state's Convention breaches are not isolated incidents, but rather amount to an 'administrative practice', in an attempt by the applicant state to prevent their recurrence. The consequences of such a finding are that there are therefore deemed to be no effective domestic remedies, not least because an administrative practice requires 'official tolerance', either by the direct superiors of those immediately responsible for the acts involved or that of a higher authority.⁵⁶ This was in issue, for example, in *Georgia v Russian*

⁴⁸ *Greece v the United Kingdom* (I) and *Greece v the United Kingdom* (II) (n 15).

⁴⁹ Dickson (n 29) 152.

⁵⁰ *Ireland v the United Kingdom* (n 16) para 153.

⁵¹ *Loizidou v Turkey* (n 25).

⁵² *Chiragov and Others v Armenia* (n 26).

⁵³ *Sargsyan v Azerbaijan* (n 27).

⁵⁴ See further: Milanovic (n 28) and Leach (n 3).

⁵⁵ *Ireland v the United Kingdom* (n 16) paras 209-210.

⁵⁶ See: *France, Norway, Denmark, Sweden and the Netherlands v Turkey* 9940-9944/82 (ECmHR, dec, 6 December 1983) paras 19-20. 1. It remains rather unclear as to how the notion of an 'administrative practice'

*Federation (I)*⁵⁷ which concerned Russia's expulsion of Georgian nationals in 2006. It originated in the arrest in Tbilisi of four Russian officers on suspicion of espionage. The next week Russia suspended all aerial, road, maritime, railway, postal and financial links with Georgia. In Russia, there followed the detention and expulsion of thousands of Georgians. In its judgment on the merits, amidst disputed factual circumstances, the Court concluded that 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled, and that the Russian authorities had pursued a coordinated policy of arresting, detaining and expelling Georgian nationals, constituting an administrative practice.⁵⁸ This led to an unprecedented finding of a practice of the collective expulsion of aliens, in breach of Article 4 of Protocol No. 4. In addition, the unlawful arrests and detention of the Georgian nationals, and their inhuman conditions of detention, were also found to amount to administrative practices in breach of Articles 5 and 3 of the Convention.

5 A Need for Reform?

Amidst the very protracted ongoing Court reform process, which in its current guise can be said to have opened with the Interlaken Declaration in 2010,⁵⁹ it was only during the Copenhagen conference in 2018 that proposals concerning inter-state cases, or cases arising from armed conflict, were first aired. That will have been the consequence of the mounting number of such cases in the Court's docket, as noted above. Prior to 2018, the earlier declarations expressed consistent concern about the Court being over-loaded with cases, and the need to process cases more quickly. Indeed, there has been a definite emphasis on the pressing need to address the most serious cases (which are likely to include inter-state cases and cases arising from conflict). At Interlaken, the states exhorted the Court to 'adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights'.⁶⁰ At Brighton in 2012, it was said that the Court 'should be able to focus its attention on potentially well-founded new violations'.⁶¹ That conference also welcomed the Court's adoption of its priority policy, which had 'helped it focus on the most important and serious cases'.⁶²

It was something of a surprise, then, that the first draft of the Copenhagen Declaration, adopted in 2018 in the context of the then Danish Government's undisguised hostility to the Court, contained a proposal (paragraph 54.b) to establish 'separate mechanisms' to deal with both inter-state and

relates to Article 18 of the Convention (which prevents states from applying restrictions to Convention rights for ulterior purposes) – they may be overlapping. In *Georgia v Russian Federation (I)* (n 17), having found an administrative practice, the Court decided it was not necessary also to consider Art 18 (para 224). In her partly dissenting opinion, Judge Tsotsoria argued that the Court should have examined Article 18 in conjunction with Article 5 and should have come to the conclusion that the whole legal machinery of the state was misused and that from beginning to end the Russian authorities had acted with bad faith and in blatant disregard of the Convention, amounting to an administrative practice in breach of the two provisions.

⁵⁷ *Georgia v Russian Federation (I)* 13255/07 (ECtHR, dec, 30 June 2009).

⁵⁸ *Georgia v Russian Federation (I)* (n 17), paras 135 and 159.

⁵⁹ Council of Europe, High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010: <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf>.

⁶⁰ *Ibid*, 3, para A2.

⁶¹ Council of Europe, High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, para 19: <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf>.

⁶² *Ibid* para 20.

individual cases arising from international conflicts, which was said to be in the interests of achieving a 'balanced caseload'.⁶³

As has been noted elsewhere,⁶⁴ there was no explanation forthcoming to indicate why this category of cases had suddenly been selected for exclusion, over and above any other category of case which may have its complexities and result in substantial litigation. There was also no further dissection as to what such an 'alternative mechanism' would look like, or how it would operate or be financed, and no indication as to whether there was broader political support from member states. At the time Madsen and Christoffersen suggested that the Court's docket included 'many unreasonably old cases stemming from inter-state conflicts', which required 'rethinking how justice can better be served in those difficult circumstances', although they acknowledged that the preliminary work had not yet been done.⁶⁵ The Court, in its response, suggested that it was important to acknowledge in the Declaration 'the challenges posed to the Convention system by such situations in Europe', before requesting clarification of the reference to 'separate mechanisms'.⁶⁶

The proposal contradicted the express stipulation in Article 15 of the Convention that its provisions continue to apply in situations of 'war or other public emergency'. In any event, like the rest of the most contentious aspects of the first draft of the Copenhagen Declaration, the reference to establishing a separate mechanism for inter-state (and related) cases was subsequently scrapped. The final Declaration called on the Committee of Ministers to consider the prospects of 'achieving a balanced case-load', *inter alia*, by:

exploring ways to handle more effectively cases related to inter-State disputes, as well as individual applications arising out of situations of inter-State conflict, without thereby limiting the jurisdiction of the Court, taking into consideration the specific features of these categories of cases *inter alia* regarding the establishment of facts.⁶⁷

The two most important elements of this instruction were therefore to assess how to be more effective in conducting such cases, together with the proviso that there should be no shrinking of the Court's jurisdiction. No longer was there any suggestion of side-lining or downgrading inter-state or conflict cases.

In the light of what came out of Copenhagen, the remit given by the Steering Committee for Human Rights to the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC)⁶⁸ was to develop proposals to improve the effective processing and resolution of cases relating to inter-state disputes, as well as individual applications arising from situations of conflict between states (and to do so 'without thereby limiting the jurisdiction of the Court').

⁶³ See: A Donald and P Leach, 'A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten' (*EJIL: Talk!*, 21 February 2018): <<https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/>>.

⁶⁴ *Ibid.*

⁶⁵ M Madsen and J Christoffersen, 'The European Court of Human Rights' View of the Draft Copenhagen Declaration' (*EJIL: Talk!*, 23 February 2018): <<https://www.ejiltalk.org/the-european-court-of-human-rights-view-of-the-draft-copenhagen-declaration/>>.

⁶⁶ European Court of Human Rights, Opinion on the draft Copenhagen Declaration, 19 February 2018, para 26: <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhagen%20ENG.pdf>.

⁶⁷ Council of Europe, Copenhagen Declaration, 13 April 2018, para 54(c): <https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf>.

⁶⁸ On the DH-SYSC Committee there were 11 designated member states: Armenia, Azerbaijan, Croatia, Georgia, Germany, Greece, Netherlands, Russian Federation, Serbia, Slovenia, Switzerland (Chair).

In June 2019 the European Court's Committee on Working Methods published a report about the more efficient processing of inter-state cases, and related individual cases, which were said to create 'exceptional challenges' for the Court, especially when they concern armed conflict (the Court's 2019 report).⁶⁹ Those challenges were not directly spelt out, but can be gleaned from the proposals in the paper: the establishment of the facts; the lodging of voluminous submissions; the need to translate large numbers of documents; the overly onerous requirement to have separate stages (including hearings) to consider the admissibility and merits of inter-state cases; the normally very complex procedure required to decide on damages and redress; and the length of time taken to process the cases.

The Court's 2019 report made a number of proposals, including the desirability of holding a witness and expert hearing if possible, preferably in Strasbourg, especially as regards cases of armed conflict, and the need to adjust the processing of inter-state cases, to ensure greater efficiency and their speedier resolution (enabling the Court to retain a discretion to consider admissibility and merits questions at the same time, and to relinquish cases rapidly to the Grand Chamber). Furthermore, it was proposed that state parties should be required to provide translations of documents submitted and as regards Article 41, states should submit identifiable lists of victims early on in the case, and should be subject to time limits for submitting observations.

In the following sections of this paper, further consideration will be given to the conduct of inter-state and conflict-related cases, starting with the key issue of establishing the facts.

6 Obtaining and Assessing Evidence

One of the elements highlighted by the Copenhagen Declaration as needing further scrutiny in the course of the Court reform process, was the establishment of the facts in inter-state cases (and related individual cases).⁷⁰ The Court itself has described this as 'one of the greatest challenges' raised by inter-state cases, not least because the Court is often required to act like a court of first instance, in the absence of prior domestic court adjudications.⁷¹ The task is made even more demanding because the scale or nature of the violations alleged often also necessitate an assessment as to whether there has been an 'administrative practice', a term which requires sufficient evidence both of the repetition of the acts in question, and 'official tolerance' by the state.⁷² Furthermore, state non-cooperation is frequently a feature of such cases (as discussed in section 7).

6.1 Fact-finding Hearings

The Court's 2019 report appears to be very supportive of the holding of fact-finding hearings, a position which is line with its usual practice in inter-state cases (in which witness hearings have always been held), but not as regards individual applications, in which fact-finding hearings have become very rare. It further suggests that 'the hearing of experts may prove particularly useful'.⁷³ It is also strongly supportive of holding such hearings in Strasbourg (as it did for example in *Georgia v Russian Federation* (I) and *Georgia v Russian Federation* (II)), on the grounds of cost. The fact-finding work carried out by

⁶⁹ European Court of Human Rights, Committee on Working Methods, Proposals for More Efficient Processing of Inter-state cases, 5 June 2019 (a redacted version of a report adopted by the plenary of the Court on 18 June 2018).

⁷⁰ Copenhagen Declaration (n 67) para 54(c).

⁷¹ Committee on Working Methods (n 69) paras 20-21.

⁷² See, for example, *Georgia v Russia* (I) (n 17) paras 122-124. See also the discussion of the term in section 4 above.

⁷³ Committee on Working Methods (n 69) para 24.

the Commission or the Court has often been a key feature of inter-state cases, and it has frequently been lauded by commentators.⁷⁴

Research published in 2009 (the Fact-Finding Report) showed the benefits, in certain cases, of holding fact-finding hearings in order to supplement the usual paper-based Court process.⁷⁵ By that time, the Commission and Court had held fact-finding hearings in 92 cases involving 16 states (hearing an average of 15 witnesses per case). Of those cases, 5 were inter-state cases and 63 were individual conflict-related cases (57 relating to south-east Turkey, 3 to northern Cyprus, 2 concerning Northern Ireland and 1 relating to Russia and Georgia). The other cases primarily concerned allegations of ill-treatment of detainees (19 cases). At least one violation of the Convention was found in 71 of the cases (8 cases resulted in a friendly settlement). Of those 71 cases, 90% concerned Articles 2 or 3 of the Convention. Of the respondents consulted by the researchers, 90% took the view that in some cases fact-finding hearings are crucial in securing a fair judgment.⁷⁶

According to the Fact-Finding Report, the absence of clear facts (which require resolving in order to determine a case) was the *sine qua non* for holding fact-finding hearings, and they were more likely to be held where there was considered to be a systematic failure in the functioning of the domestic courts.⁷⁷ Also relevant to the decision to hold a hearing was whether the Court could discern reasonable prospects that it might lead to the establishment of a Convention violation, and further, whether there was a likelihood of establishing a *substantive* violation (for example of Article 2), as opposed to merely a *procedural* violation.⁷⁸ One important disincentive to holding fact-finding hearings was a government's effective denial of co-operation in a case, and another significant factor was the amount of time passed since the events in question had taken place.⁷⁹ In addition, the Fact-Finding Report established that cost and time factors were considerable disincentives to holding fact-finding hearings. Nevertheless, it was shown that the cases involving such hearings took an average of six years to be processed by the Court. Furthermore, 92% of the respondents⁸⁰ to the research did not agree with the idea that the costs involved were not justified, when compared with the potential benefits of such hearings.

⁷⁴ In the very first inter-state case, *Greece v the United Kingdom* (I), the Commission decided that it needed to 'obtain direct knowledge of the facts' (notably as regards the extent of the public emergency and the application of curfew laws) by carrying out on the spot investigations in Cyprus (in the face of strong opposition from the UK Government). In January 1958, six members of the Sub-Commission heard 67 individual witnesses, and visited a detention camp and several villages where it heard statements by representatives of the Turkish and Greek communities. See: *Greece v the United Kingdom* (I) (n 15) 47-52. Commenting on the inter-state proceedings between Ireland and the UK, Kevin Boyle argued that the 'painstaking and lengthy investigation into the facts undertaken by the Commission stands in striking contrast to the role of the domestic common law courts and the Committees of Inquiry' (K Boyle, 'Human rights and political resolution in Northern Ireland' (1982) 9 *Yale Journal of International Law* 156, 166).

⁷⁵ P Leach, C Paraskeva and G Uzelac, 'International Human Rights & Fact-finding – an Analysis of the Fact-finding Missions conducted by the European Commission and Court of Human Rights' (London Metropolitan University, 2009). Given the scarcity of European Court fact-finding hearings in recent years, it is suggested that the findings of this report remain valid.

⁷⁶ Ibid. 33. 81 people responded to the researchers' questionnaire: former and serving members of the Commission and Court; former and serving members of the Court Registry; and state representatives and applicant representatives who had taken part in fact-finding hearings.

⁷⁷ Ibid. 38-39.

⁷⁸ Ibid. 40-41.

⁷⁹ Ibid. 40-42.

⁸⁰ Ibid. 42-43.

After a hiatus during the 1990s, when the Commission and Court held a series of in-country hearings in order to adjudicate on cases of gross violations committed by the security forces in south-east Turkey, the number of such hearings in individual cases has been negligible. The reason for that would appear to be both the additional time expended, and the extra costs incurred in having to dispatch a Court team, comprising judges, secretariat lawyers and other support staff, into one of the Council of Europe states for perhaps one or two weeks. However, why the Court should always hold fact-finding hearings in inter-state cases, but almost never do so in individual cases is an anomaly which requires an explanation. The Court's clearly favourable position taken in its 2019 report is to be welcomed, as it advocates holding a witness and expert hearing if possible, especially in cases concerning armed conflict (not necessarily limited to inter-state cases).

Another important question is the location where fact-finding hearings are held. The Court's clear preference is to hold them in Strasbourg. This is partly on grounds of cost⁸¹ and the convenience of Court judges and staff, and as O'Boyle and Brady have noted, it has the advantage too of offering a neutral venue, which may avoid disagreements between the parties as to where the fact-finding should properly take place.⁸² In *Georgia v Russian Federation* (I) (relating to the expulsion of Georgian nationals) a delegation of five Grand Chamber Judges (Josep Casadevall, Anatoly Kovler, Mark Villiger, Isabelle Berro-Lefèvre and Nona Tsotsoria) heard evidence from 21 witnesses in Strasbourg, in camera in the presence of the parties' representatives. The witnesses comprised eight Georgian nationals who had been arrested, detained and expelled from Russia, ten Russian public officials, and two witnesses selected by the Court: the then rapporteur of the PACE Monitoring Committee and a human rights official with the OSCE mission in Georgia.⁸³

However, there are other important elements which are relevant to the decision as to where a hearing should take place. The Fact-Finding Report found that the location of a fact-finding hearing may have significant implications for witnesses and applicants, and that it is important that a 'neutral' venue is chosen, with careful consideration given to the logistical difficulties for witnesses.⁸⁴

O'Boyle and Brady note that holding a hearing in Strasbourg 'presupposes that the witnesses are free to travel and willing to do so, not something to be taken for granted in a politically contentious case'.⁸⁵ There may also be considerable cost and logistical difficulties (including the need to take time off work) for some witnesses to travel out of their region.

Another important consideration is the benefit of judges themselves witnessing the circumstances in the location where the events in question took place. In his dissenting opinion in *Ireland v the United Kingdom* (commenting on his experience in the *Greek* case), Judge O'Donoghue highlighted the importance of being at the site in question:

The value of hearing evidence in a local venue cannot be overestimated....I visited some of the places of detention and heard the witnesses on complaints of ill-treatment inflicted on them in detention. No written description, however colourful, could have been as informative as the visit to Bouboulinos Street in Athens...It would also have been instructive and illuminating to have seen the extent of the destruction throughout Belfast.⁸⁶

⁸¹ A fact-finding hearing has been estimated to cost in excess of €20,000: O'Boyle and Brady (n 28) 387, n 53.

⁸² O'Boyle and Brady (n 28), 379.

⁸³ *Georgia v Russian Federation* (I) (n 17).

⁸⁴ Leach, Paraskeva and Uzelac (n 75) 53-54.

⁸⁵ O'Boyle and Brady (n 28) 379.

⁸⁶ *Ireland v the United Kingdom* (n 16).

O'Boyle and Brady see multiple benefits of holding fact-finding hearings:

In addition to the values of justice and vindication that are being served...they also provide the Court with an opportunity to get to grips with the details of the contested events in a way that leaves few stones unturned and adds strength and persuasiveness to the Court's conclusions. Judgments based on fact-finding often reveal structural deficiencies in the legal system that run like a red thread through many of the serious cases.⁸⁷

Commentators have underlined the various benefits of regional mechanisms holding hearings *in-country*, such as improving levels of state attendance and engagement, and enhancing the understanding of all those involved (parties and judges).⁸⁸ The Fact-Finding Report also suggested that the hearings can have a pedagogical function, identifying 'a strong perception that personally exposing state representatives to the workings of the Court, and the principles of the Convention, through the holding of an in-country hearing, does have a positive effect'.⁸⁹

6.1.1 The Non-attendance of Witnesses

The Fact-Finding Report identified that a significant problem encountered during fact-finding hearings has been the failure of witnesses to appear, even after being officially summoned. This was a common feature of the cases from south-east Turkey, for which many reasons were put forward: problems of timing (including holidays); the Court's inability to require a witness to attend; the inability to locate a witness; the old age of the witness; insufficient financial means and the classified identities of the witnesses.⁹⁰ However, fear of the consequences of attending and giving evidence was perceived to be the most common cause for non-attendance, amongst 67% of questionnaire respondents. An applicant lawyer explained what happened in one case when a key witness was asked to give evidence:

...he said, he had a question -... "if I say yes, tomorrow maybe someone will come and take me from my village; would you be able to stop him?" And I could not tell him anything, and he was afraid and did not come to the Court – he did not give the statement.⁹¹

A further problem has been the non-attendance of state agents who are called to give evidence (such as prosecutors, police officers and members of the security forces). One judge commented as follows:

⁸⁷ O'Boyle and Brady (n 28) 386.

⁸⁸ See, for example: C Burbano Herrera 'The Inter-American Court of Human Rights and its Role in Preventing Violations of Human Rights through Provisional Measures' in Y Haeck, O Ruiz-Chiriboga and C Burbano Herrera (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia, 2015) 356, 372-374; C Sandoval, P Leach & R Murray, 'Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?' (2020) *Journal of Human Rights Practice* 1, 11-13 (this article discusses hearings in the context of the implementation of judgments and decisions). Leckie has written supportively of the fact-finding approach adopted by the ILO, which has been to appoint commissions of inquiry for inter-state cases, which he argues were successful in that they carried out productive on-site investigations, established violations of international law, encouraged the respondent governments to reform domestic legislation and put forward detailed and realistic recommendations (all finalised in relatively short periods of time). See Leckie (n 7) 282-289.

⁸⁹ Leach, Paraskeva and Uzelac (n 75) 43.

⁹⁰ Ibid. 58. Rule A5(6) of the Court Rules deals with witnesses' costs. The default position is that where a witness is summoned at the request or on behalf of a state party, the costs of their appearance is borne by the state. In other situations, the Court has a discretion to decide whether or how to award costs, including whether the costs should be borne by the Council of Europe or awarded against the applicant or third party at whose request or on whose behalf the person appears.

⁹¹ Ibid. 59.

Sometimes we are told that the person is now doing national service and consequently is on some distant part of [the country] and cannot be reached. Sometimes in the case of prosecutors we are simply told that they have decided not to turn up without any reasons being given.⁹²

Non-attendance of witnesses arose in *Georgia v Russian Federation* (I). The day before a senior official at the Russian Directorate of Internal Affairs was due to give evidence, the Court was informed that he had been urgently admitted to hospital. Vladimir Lukin, the then Commissioner for Human Rights in Russia, did not reply to the Court's summons. Ella Pamfilova (who, at the time of the events in question, had been Head of the President's Advisory Council on Human Rights and Civil Society) also did not give evidence – the authorities explained that as she was no longer a public official but a private individual, they were unable to provide the Court with her address.⁹³

The failure of witnesses to participate in fact-finding proceedings may of course deprive the Court, and the parties, of evidence which could be significant in assessing particular issues arising in the litigation. Such problems reflect the fact that the Court has no powers to compel a witness to attend a hearing to give evidence. The Fact-Finding Report noted that a high proportion of respondents (72%) were in favour of the Court having a means to compel attendance, and two thirds agreed that the domestic legal system should be able to take appropriate action when a witness does not turn up.⁹⁴

The Court is able to mitigate the effects of non-attendance of witnesses to some extent by drawing inferences from any lack of governmental co-operation,⁹⁵ but there is an open question as to whether this is easier for the Court to do in individual applications than in inter-state cases.

6.1.2 The Safety and Security of Witnesses

Whether witnesses turn up to fact-finding hearings may depend on the extent to which they consider it safe to do so. Under present rules, the ability of the Court to take steps to ensure the safety and security of witnesses seems very limited. Applicants, witnesses and their representatives who take part in European Court hearings are given some protections by a 1996 convention which guarantees their free movement and travel, and provides immunity from legal process.⁹⁶ However, there are no specific provisions covering the safety or security of the parties or witnesses. For hearings held in-country, the state concerned is required by the Court Rules to ensure freedom of movement and to take 'adequate security arrangements'. Furthermore, the rules also stipulate that the state authorities should ensure that 'no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation'.⁹⁷

However, this rule applies to in-country hearings. There are no specific provisions as regards safety and security of witnesses where hearings are held at the Court in Strasbourg (for example to allow a witness to travel there safely from another Council of Europe state).

⁹² Ibid. 60.

⁹³ *Georgia v Russian Federation* (I) (n 17) paras 90-92.

⁹⁴ Leach, Paraskeva and Uzelac (n 75) 61. Rule A5(4) of the Court Rules provides, inter alia, that '[t]he Contracting Party shall further take all reasonable steps to ensure the attendance of persons summoned who are under its authority or control', which might require, for example, the adoption of legislative or administrative measures.

⁹⁵ See, for example, *Taniş and Others v Turkey* 65899/01 (ECtHR, 2 August 2005), paras 160, 163.

⁹⁶ European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights, ETS No. 161, 5 March 1996, Articles 2 and 4 (which has been ratified by 40 of the 47 Council of Europe states).

⁹⁷ Rule A2(2) of the Annex to the Court Rules (concerning investigations).

In 2007, noting that in a ‘significant number of cases’, state authorities had failed to co-operate with the European Court in its investigation of the facts, the Parliamentary Assembly of the Council of Europe published a resolution emphasising states’ obligation to co-operate fully with the Court, which included a call on states to

take positive measures to protect applicants, their lawyers or family members from reprisals by individuals or groups including, where appropriate, allowing applicants to participate in witness protection programmes, providing them with special police protection or granting threatened individuals and their families temporary protection or political asylum in an unbureaucratic manner.⁹⁸

The lack of provisions available to the Strasbourg Court to ensure the protection of witnesses can be contrasted with the position of the International Criminal Court (ICC). The Rome Statute of the ICC requires that ‘the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’.⁹⁹ In doing so, the ICC may also take all relevant factors into account, including age, gender and health. Witnesses at the ICC are supported by the Victims and Witnesses Unit which is able to provide, where required, psychosocial support, crisis intervention, and access to medical care. Furthermore, witnesses are taken through a process of ‘familiarisation’ of the court rooms and trial procedure. If necessary, the ICC can utilise its emergency response system to ensure that a witness is taken to a safe location, and longer term, the ICC Protection Programme (ICCPP) can ensure that witnesses and their relatives are relocated. Within the court room, there are various procedural protective measures available, such as face or voice distortion, the use of pseudonyms, and a psychologist or family member may be permitted to accompany a witness.¹⁰⁰

6.2 The Use of Technology in Obtaining and Assessing Evidence

For the first time, in the case of *Sargsyan v Azerbaijan*, the Court used satellite imagery (provided by the American Association for the Advancement of Science) in order to establish the position of the applicants’ former village, from where they had been expelled, and to confirm the presence of armed forces and the condition of the abandoned houses in the village.¹⁰¹ The potential for new and developing technology to enhance the international human rights litigation process in many different ways appears to be enormous, although this raises significant challenges too.¹⁰²

At the time when the Fact-Finding Report was published in 2009, the European Court had not used electronic means to allow witnesses to give evidence. Amongst respondents, there was broad support for its use (78% of respondents), although primarily as a means of supplementing (not replacing) fact-finding hearings, for example, when a missing witness subsequently turns up at a later date.¹⁰³ In 2020 the COVID-19 pandemic forced the Court to hold its admissibility and merits hearings by videoconference. At the time of writing there was no longer any public access to the Court building,

⁹⁸ Parliamentary Assembly of the Council of Europe, Resolution 1571 (2007), Member states’ duty to co-operate with the European Court of Human Rights, 2 October 2007, para 17.2.

⁹⁹ Article 68(1).

¹⁰⁰ See, for example: Understanding the International Criminal Court: <<https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>>.

¹⁰¹ *Sargsyan v Azerbaijan* (n 27), paras 10, 72-75.

¹⁰² See, for example: S Padania, S Gregory, Y Alberdingk-Thijm and B Nunez B ‘Cameras Everywhere: Current Challenges and Opportunities at the Intersection of Human Rights, Video, and Technology’ (Witness, 2011); S Gregory, ‘Cameras Everywhere Revisited: How Digital Technologies and Social Media Aid and Inhibit Human Rights Documentation and Advocacy’ (2019) 11(2) *Journal of Human Rights Practice* 373–392.

¹⁰³ Leach, Paraskeva and Uzelac (n 75) 66-68.

Aside from the manner in which witnesses are heard, technology can undoubtedly be harnessed in many ways to improve how evidence is gathered and assessed. It has been often been taken as read that if fact-finding can only take place a long time after the events in question, this is likely to hamper the process in various ways. As O'Boyle and Brady, have argued, 'the passage of time is... the enemy of human rights adjudication':

However, Accatino and Collins have noted that the use of new scientific techniques may in fact enhance fact-finding - although this will depend on the capacity of judges and courts to understand technological advances. They argue that:

Forensic experts Rebecca Gowland and Tim Thompson have underlined that the passage of time is not an automatic bar to the effective investigation of killings and disappearances in conflict, by combining DNA analysis and other methods:

Gowland and Thompson further note that identification is possible through the use of forensic archaeology, forensic anthropology, forensic odontology and forensic genetics. Furthermore, mass graves can be located using a combination of archives, local intelligence, witness testimony, and archaeological techniques.¹⁰⁷ As regards the cases of disappearances in Chechnya between 1999 and 2006, they have argued that it is ‘highly likely that human remains are recoverable from Chechnya in a

¹⁰⁷ Ibid.

condition that would allow identification’.¹⁰⁸ It also cannot be assumed that domestic fact-finding processes are to be preferred. In their view, in such situations, domestic institutions may not be capable of investigating historic conflicts, as human identification will require specialist teams with specific expertise which falls outside of normal law enforcement activities.

How courts and parties to litigation can effectively evaluate the plethora of video and other evidence available online, and on various social media platforms, raises huge challenges, notably as regards authenticity. However, open source investigators and analysts have demonstrated that technology can be successfully used to help distinguish the real from the fake. By way of example, the investigative website Bellingcat has explained how it sought to verify videos which emerged in October 2020 (on Azerbaijani Telegram channels) in the midst of the renewed hostilities between Armenia and Azerbaijan over Nagorno-Karabakh. The videos purported to show the detention and subsequent execution of two Armenians by Azerbaijani soldiers in the town of Hadrut, although the Azerbaijani Ministry of Defence claimed that they were staged. Bellingcat analysed the weaponry, uniforms and languages spoken. They used geolocation to establish that the first film of the detained men took place at the northern edge of the town (which Azerbaijan had claimed to have captured) and that the second video, apparently of their shooting, took place in a park in the south of the town. Shadow analysis was used to establish the time of these events. Taken together, this led Bellingcat to conclude that the videos were authentic.¹⁰⁹

Advances in technology can also be used by litigants and courts to sift and process evidence, which may be especially useful where large volumes of evidence need to be reviewed and assessed. This may be the case, for example, for user-generated video evidence. Scientists and researchers at SITEU Research and Carnegie Mellon University were commissioned by lawyers in Ukraine to analyse the video evidence of clashes which took place between protesters and riot police during the Euromaidan protests in Kyiv on 20 February 2014, when 48 people were killed and 200 were injured.¹¹⁰ This comprised 520 videos (about 65 hours) mostly taken from the ground by protesters, bystanders, and photojournalists, which were primarily retrieved from social media (meaning therefore that metadata relating to time and location were not available). As manual analysis would take too long, using event reconstruction, as well as semi-automated means of synchronising videos and geolocating cameras, they created a digital, interactive platform, to be used in domestic proceedings in Ukraine. This tool, they suggest, provided ‘a concise narrative of what is otherwise an overwhelmingly complex sequence of events’; its greatest strength is ‘the ability to analyse large volumes of video footage and integrate it with other forms of evidence in a package that can be viewed and understood by non-specialists’. Of course, it should be acknowledged that video evidence is no panacea: it ‘must be viewed with healthy scepticism’ and should be ‘combined with other available data, expert knowledge, and eyewitness testimony in order to provide a nuanced understanding of what has taken place’.

In 2019 the European Human Rights Advocacy Centre (EHRAC) commissioned the digital investigations agency, Forensic Architecture, for the purposes of litigation arising from the armed conflict in eastern Ukraine in 2014. The case concerns the capture of Ukrainian volunteer combatants, allegedly by the Russian armed forces, during the battle of Ilovaisk in August 2014.¹¹¹ The agency used open source

¹⁰⁸ Ibid., 13.

¹⁰⁹ N Waters, ‘An execution in Hadrut, Bellingcat’ (Bellingcat.com, 15 October 2020): <<https://www.bellingcat.com/news/rest-of-world/2020/10/15/an-execution-in-hadrut-karabakh/>>.

¹¹⁰ J Aronson, M Cole, A Hauptmann, D Miller and B Samuels, ‘Reconstructing Human Rights Violations Using Large Eyewitness Video Collections: The Case of Euromaidan Protester Deaths’ (2018) 10(1) *Journal of Human Rights Practice*, 159–178.

¹¹¹ *Ponomarenko v Ukraine and Russia, and 19 other applications* 60372/14 (communicated on 28 August 2017).

investigation techniques, and devised an algorithm using machine learning which enabled them to search the internet for evidence of Russian military presence in and around Ilovaisk. They used geolocation and other techniques to verify videos showing, for example, captured Russian servicemen and Russian tanks – they did so by comparing the videos with other film from the region and also using satellite imagery. In order to present this evidence, they created an online platform, which was both submitted by EHRAC to the European Court (to supplement a large volume of documentary evidence which was also provided to the Court) and made publicly available.¹¹² This type of evidence may therefore be important in establishing the extent of a state's jurisdiction under Article 1 of the Convention – in this example, by confirming whether or not a state is deemed to have been exercising extra-territorial jurisdiction, either as a result of its effective control of an area beyond its territorial boundaries or through state agent authority and control.¹¹³

It is incumbent on everyone involved in international human rights practice (including judges, court lawyers and managers, government representatives, applicant lawyers and NGOs) to develop a sufficient understanding of the ways in which new technology can be harnessed for use in litigation, and the challenges which it raises. In 2015, the Office of the Prosecutor of the ICC identified as one of its priorities the enhancement of its scientific and technology-related capabilities, in order to be able to collect different forms of evidence other than witness statements.¹¹⁴ The ICC brought in cyber investigators to conduct online investigations, and has been developing external partnerships with law enforcement bodies, NGOs and academic institutions working in this field. In 2017 the ICC for the first time issued an arrest warrant which was based primarily on evidence obtained from social media, in respect of a commander of the Al-Saiqa Brigade who was accused of multiple murders in Libya. Emma Irving has argued that these developments are 'just the beginning of what will be a long, and likely complex, relationship between open source evidence and international criminal justice'.¹¹⁵

7 Problems in Processing Inter-state Cases

7.1 Delays in Inter-state Cases

The inadequacies frequently evident in the processing of inter-state cases are likely to be linked: the passage of time will be lengthened by states' delayed engagement or their failure to co-operate, as well as their resort to filing excessive amounts of documentation. The time apparently needed to adjudicate on inter-state cases has continued to increase over the years. The admissibility of the inter-state cases lodged in the 1950s, 1960s and 1970s was dealt with in a matter of a few months. The first two cases brought by Cyprus against Turkey over the invasion of northern Cyprus in 1974, lodged in 1974 and 1975, were adjudicated on their merits by the Commission in July 1976, with findings of violations of Articles 2, 3, 5, 8, 13 and 14, as well as Article 1 of Protocol No. 1.¹¹⁶ These periods increased considerably in the 1990s and 2000s: in *Cyprus v Turkey* (IV) (lodged in 1994) the admissibility decision took 19 months; in *Denmark v Turkey* (lodged in 1997) it took 2 years and 5 months; *Georgia v Russian Federation* (I) (lodged in 2007) took 2 years and 3 months; *Georgia v*

¹¹² See, for example: S Walker, 'New evidence emerges of Russian role in Ukraine conflict' *The Guardian* (London, 18 August 2019). The online platform can be viewed here: <<https://ilovaisk.forensic-architecture.org/>>.

¹¹³ The leading Court authority on this area is *Al-Skeini and Others v the United Kingdom* [GC] 55721/07 (ECtHR, 7 July 2011).

¹¹⁴ International Criminal Court, Office of the Prosecutor: Strategic plan 2016-2018, ICC-ASP/14/22, 21 August 2015.

¹¹⁵ E Irving, 'And So It Begins... Social Media Evidence In An ICC Arrest Warrant' (*Opinio Juris*, 17 August 2017): <<http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/#undefined.uxfs>>.

¹¹⁶ *Cyprus v Turkey* (I) and (II) 6780/74 & 6950/75 (ECmHR, report, 10 July 1976).

Russian Federation (II) (lodged in 2008) took 3 years and 4 months. However, even those periods pale into insignificance when compared with the more recent cases – at the time of writing (October 2020) there had still been no admissibility decision in respect of the applications lodged by Ukraine against Russia in 2014 and the case brought by Slovenia against Croatia in 2016. As regards the delivery of judgments on the merits, the latest such decision took seven years - in *Georgia v Russian Federation* (I). The just satisfaction judgment required another five years. There was a comparable six and a half year wait for the merits judgment in *Cyprus v Turkey* (IV), but the additional wait for delivery of the just satisfaction judgment in 2014, meant that twenty years had elapsed since the case was first introduced in 1994.

There is seemingly a contradiction in the Court's treatment of inter-state cases, as the timings would suggest that they are not expedited, in spite of their significance, both for states, and for the victims of human rights violations to which the cases relate. Unlike individual applications, the Court's rules require that an inter-state application must be immediately communicated to the respondent government.¹¹⁷ These cases were formerly classed as group II, in the Court's priority policy, but in 2009 they were taken out of the priority policy altogether, 'in view of their special character which in any event attracted special procedural treatment'.¹¹⁸ There is ambiguity here, whether deliberate or not, as it is not clear whether this means greater or less prioritisation, or whether the speed of processing will be decided by the Court on a case-by-case basis.

Delays appear to be caused both by the Court's relatively lax imposition of time limits on state parties, and their dilatory responses. Both were evident, for example, in the case of *Georgia v Russian Federation* (I), in which the parties were granted a full 12 months to lodge their submissions on just satisfaction. The identification of the individual Georgians who had been expelled from Russia was clearly problematic for the Georgian Government. It was invited to provide a list of victims in November 2015, but it was only in April 2016 that an initial list of 345 victims was filed, and as late as August and September 2016 that a second list of 1,795 victims was provided.¹¹⁹ After the Court issued its merits judgment in *Cyprus v Turkey* in 2001, remarkably it omitted to set down any time limit for the applicant Government to lodge its just satisfaction claims, which were only submitted in 2010. This nine year delay proved to be no bar to their acceptance by the Court,¹²⁰ apparently because in the intervening period the case had remained pending at the Committee of Ministers without Turkey complying with it.¹²¹

7.2 The Effects on Related Individual Applications

Taking many years over the adjudication of inter-state cases has a serious knock-on effect on related individual cases. As noted above (section 3), there may be thousands of individual applications riding on the coattails of the conflict-related inter-state cases. This could be advantageous, for example, where the Court's decisions in the inter-state cases establish key questions of fact, jurisdiction or merits, and the individual cases can then be treated to a certain extent as 'WECL' cases (well-established case law) which might then mean a smoother ride. However, it is highly questionable whether individual cases actually do benefit from following in the wake of inter-state applications. The Court's convention is to prioritise inter-state over individual cases, meaning that in practice individual

¹¹⁷ Rule 51(1) of the Court's Rules.

¹¹⁸ European Court of Human Rights, The Court's Priority Policy: <https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf>.

¹¹⁹ *Georgia v Russian Federation* (I) [GC] 13255/07 (ECtHR, 31 January 2019) paras 3-6.

¹²⁰ *Cyprus v Turkey* (IV) [GC] 25781/94 (ECtHR, 12 May 2014) paras 23-30.

¹²¹ Ibid, concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, paras 8-9.

applications can be held back for considerable periods (of years) while the states battle things out. Such delays have obvious detrimental effects, as the gathering and preservation of evidence becomes more problematic, memories fade and some applicants and witnesses die. These problems have been evident, for example, in individual applications brought by the Georgian Young Lawyers' Association (GYLA) and the European Human Rights Advocacy Centre (EHRAC) arising from the 2008 South Ossetia conflict between Georgia and Russia. Although lodged as far back as 2009, these cases still remain pending and unresolved at the Court.

As well as the problem of delay, the inter-relatedness of inter-state and individual cases arising from the same situations of conflict creates additional difficulties as regards the litigation process. EHRAC's caseload includes individual cases relating to ongoing conflict in eastern Ukraine and the conflict between Armenia and Azerbaijan over Nagorno-Karabakh. In addition to the resolution of the facts, a number of these cases also raise novel and complex questions of admissibility, jurisdiction or merits. In some of these cases, respondent governments have relied in their pleadings on their submissions in the parallel inter-state application, without specifying or otherwise spelling out their arguments. EHRAC's response was to request disclosure of the inter-state pleadings, so we could be fully apprised of the arguments being put forward by the state. To our surprise, this was initially rejected by the Court, on the basis that the pleadings in the inter-state case were confidential. When we pressed further, arguing that of course we had to be properly informed of the arguments on which the government was relying in the individual cases, the Court relented, to an extent, in that it required the government to spell out its arguments fully in the course of the individual applications.¹²²

Where, in certain circumstances, state pleadings have been disclosed to EHRAC, their content has raised a further problem about the inter-relationship between inter-state and individual cases. In our experience, governmental submissions can be extremely selective, distinctly politicised and sometimes raise dubious legal arguments - no doubt a consequence of the highly charged context, meaning that political pressures are foremost. As the Court's practice is to process inter-state cases ahead of individual cases (the term 'fast track' would not be appropriate), this raises a real concern that the Court may be making decisions in inter-state cases which are based on incomplete evidence or decidedly partial submissions, and without the benefit of arguments and evidence which has been presented in the course of individual cases. One potential solution to try to avoid such problems is to communicate and process a small number of (well-argued) individual cases, in tandem with the inter-state litigation, which could include those cases considered to be 'representative' of particular issues, whether factual or legal.

7.3 States' Non-cooperation

The excessive length of time taken to assess inter-state cases is exacerbated by states' perennial non-cooperation with the Court, one facet of which is non-disclosure of documentation which would also appear to be a consistent feature of inter-state applications. As regards the *Greek* case, Kamminga recalls that one of the hearings (held in Athens in 1969) had to be cut short because the Sub-Commission considered that the Government had prevented it from hearing certain witnesses, and stymied visits to a prison and detention camp.¹²³ In the litigation over northern Cyprus, the Turkish Government repeatedly refused to participate in the proceedings on the merits before the Commission,¹²⁴ failed to submit a final written pleading to the Court and did not appear at the hearing

¹²² Correspondence from the Court to EHRAC relating to *Sydorenko v Ukraine and Russia* 60373/14.

¹²³ Kamminga (n 5) 155.

¹²⁴ *Cyprus v Turkey* (I) and (II) (n 116).

before the Grand Chamber in September 2000.¹²⁵ Dickson has been critical of the ‘uncooperative stance of the British authorities’ in the course of the litigation over interrogation techniques in Northern Ireland.¹²⁶ In *Ireland v the United Kingdom*, Judge O’Donoghue was highly censorious of the UK Government’s obstructiveness:

The report of the Commission covers 502 pages and was produced after a lengthy inquiry. It is to be commended for its comprehensive review of the facts. This is all the more praiseworthy to the authors when consideration is given to the sad lack of cooperation shown by the respondent Government to the Commission and its delegates.

He continued:

The report...records the protracted process to devise a procedure to hear evidence under Article 3... It is for anyone to read these pages in order to see the marked and persistent reluctance on the part of the respondent Government to comply fully or at all in some instances with the directions of the Commission and the delegates.

Furthermore, he was more specifically critical of the UK’s Government’s intentions:

I reject the claim of the respondent Government that arrangements could not have been made to have much of the evidence heard in the local venue, and I regard the claim as an effort to raise a smoke-screen to hamper the investigation.¹²⁷

In 2014 the Irish Government applied to have its inter-state case re-opened following the broadcast of a *Raidió Teilifís Éireann* (RTÉ) documentary flagging the discovery of thousands of pages of additional documents, in the public records office in London.¹²⁸ Although the Commission had found the five interrogation techniques (hooding, wall-standing, subjection to noise, sleep deprivation, and deprivation of food and drink) to amount to torture, in its 1978 judgment the Court had down-graded this assessment to one of inhuman and degrading treatment, and the Irish Government sought to re-open this question and reinstate the finding of torture.¹²⁹ It alleged that the UK Government had adopted a policy of withholding information, which included medical reports establishing that the effects of the interrogation techniques could be ‘substantial, severe and long-lasting’.¹³⁰ However, the request for revision was rejected by the Court in 2018 on the basis of its doubts that the new documents would have had a decisive influence on the Court’s original assessment.¹³¹

More recently, in *Georgia v Russian Federation* (I) the Court referred to the ‘persistent refusal’ of the Russian Government to provide copies of two circulars relating to the expulsion of Georgian nationals. These were documents which the Court considered to be essential in establishing the facts, but the

¹²⁵ *Cyprus v Turkey* (IV) (n 47) paras 10-12.

¹²⁶ Dickson (n 29) 150.

¹²⁷ *Ireland v the United Kingdom* (n 16).

¹²⁸ See: P Leach, ‘Ireland v. UK: Revisiting the Treatment of the “Hooded Men”’ (*JURIST*, 6 December 2014): <<https://www.jurist.org/commentary/2014/12/philip-leach-hooded-men/>>; F de Londras, ‘Revisiting the Five Techniques in the European Court of Human Rights’ (*EJIL:Talk!*, 12 December 2014): <<https://www.ejiltalk.org/revisiting-the-five-techniques-in-the-european-court-of-human-rights/>>.

¹²⁹ Statement by Minister Flanagan on the ‘Hooded Men’ case, 2 December 2014: <<https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2014/december/hooded-men-case-northern-ireland/>> accessed 21 October 2020.

¹³⁰ *Ireland v the United Kingdom* 5310/71 (ECtHR, 20 March 2018) para 20.

¹³¹ *Ibid.* In her emphatic dissenting opinion, the Irish judge, Judge O’Leary, suggested that ‘there is much in the general approach of the original and revision judgments that must discourage Member States from invoking Article 33 of the Convention’ (para 77).

Russian Federation argued that they were classified as state secrets and therefore disclosure was forbidden under Russian law. Noting that there was no specific explanation for the claim to secrecy, the Court reminded the Russian Government that it could not rely on the domestic law to justify a refusal to comply with the Court's request for the production of evidence.¹³² This led the Court to find a violation of Article 38 of the Convention (the duty to 'furnish all necessary facilities' to the Court), which in turn enabled it to 'draw all the inferences that it deems relevant regarding the well-foundedness of the applicant Government's allegations on the merits',¹³³ including, in particular, 'a strong presumption that the applicant Government's allegations regarding the content of the circulars ordering the expulsion specifically of Georgian nationals are credible'.¹³⁴

7.4 Processing Documentation

The other side of the non-disclosure coin appears to be the tactic of engulfing the Court with documentation. The Court's 2019 report¹³⁵ referred to the usually voluminous submissions, observations and annexes which are submitted by the parties in inter-state cases. For example, in *Georgia v Russian Federation* (II) there were more than 30,000 pages within the case documentation.

The avalanche of documents could be curtailed by procedural rules imposing page limits on both governmental pleadings and documents lodged in support. After all, since 2014, applicants have been required to file their cases using a prescribed application form, which may be supplemented by 20 pages of additional submissions.¹³⁶ The consequence, for applicants, of failing to comply with the very detailed stipulations about the format of an application may be the striking out of the case or a decision of inadmissibility.¹³⁷ Accordingly, a corresponding tightening of the procedural rules should be introduced for both applicant and respondent governments involved in inter-state litigation, with careful thought given to the appropriate concomitant sanctions for non-compliance.

7.5 The Role of National Judges

A further seemingly intractable feature of the inter-state litigation is that its political contentiousness is all too frequently evident in the stances taken by individual Court judges from the states concerned (the Court Rules require their involvement in inter-state applications as *ex officio* members¹³⁸). Michael O'Boyle acknowledges the strengths and weaknesses of this: 'national judges have an important role to play in such cases by virtue of their expert knowledge of both the law and the context of the dispute, even though their participation may set the scene for confrontation and add an extra layer of difficulty to the decision-making process'.¹³⁹ As Brice Dickson has noted, in his lengthy dissent in *Ireland v the United Kingdom*, Sir Gerald Fitzmaurice, the UK judge, argued that the interrogation techniques used by the British authorities in Northern Ireland did not breach the Article 3 threshold

¹³² *Georgia v Russian Federation* (I) (n 17) paras 105-106.

¹³³ *Ibid* para 109.

¹³⁴ *Ibid* para 140.

¹³⁵ See, n 69.

¹³⁶ See: Rule 47 of the Court's Rules; European Court of Human Rights, Practice Direction: Institution of Proceedings, paras 1 and 5: <https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf>.

¹³⁷ Rule 47(5.1) of the Court's Rules; Institution of Proceedings (n 136), para 17. In 2014, 12,191 applications (23% of the total received by the Court) failed to comply with the Court's requirements about the application. See: European Court of Human Rights, Report on the implementation of the revised rule on the lodging of new applications, February 2015 <https://www.echr.coe.int/Documents/Report_Rule_47_ENG.pdf> accessed 19 October 2020.

¹³⁸ Rules 51(2) and 26(1)(a) of the Court Rules. See also Rule 30 (where there is more than one applicant or respondent state).

¹³⁹ Email from Michael O'Boyle to the author, 13 November 2020.

at all, whereas Judge O'Donoghue, the Irish Judge, concluded that they had constituted torture.¹⁴⁰ In the course of the inter-state litigation over northern Cyprus, the Cypriot member of the Commission, Mr Triantafyllides, argued that the Commission had not gone far enough in its findings on the merits, and the Turkish member, Professor Dr. Bülent Daver, expressed the view (echoing the Turkish Government's position) that the Cypriot Government was not even entitled to bring cases before international bodies and professed himself to be 'against the Report as a whole'.¹⁴¹ In *Georgia v Russian Federation* (I),¹⁴² the Georgian and Russian judges themselves reached assessments of the case that were apparently totally irreconcilable. In her partly dissenting opinion, Judge Tsotsoria argued that 'the Russian authorities had acted with bad faith and in blatant disregard of the Convention that amounted to an administrative practice', and that the violations were 'deeply rooted in discrimination', which was the fundamental aspect of the case. Judge Dedov, however, disputed the existence of an administrative practice or that there had been any collective expulsion, and criticised the Court for taking 'a controversial approach to the establishment of the facts, assessment of the evidence and application of its own case-law'.¹⁴³

8 Prospects of Settlement

Given the usual truculence of state parties at loggerheads through inter-state litigation, the prospects of any possibility of settlement are often very remote.¹⁴⁴ Where, rarely, settlements are agreed, they have been the target of commentators' strong critiques. For example, Kamminga decried that the cases brought against Turkey following the 1980 coup, alleging, inter alia, an administrative practice of torture, were concluded with a settlement amounting to a 'confidential dialogue' (about the adequacy and effectiveness of the domestic law on torture),¹⁴⁵ without any specific recommendations being addressed to Turkey: the Turkish Government 'must have concluded that the stamp of approval it had now received from Strasbourg removed any urgent need to adopt serious measures for the prevention of torture'.¹⁴⁶ However, it has been suggested that Turkey's acceptance of the right of individual application for the first time, in 1987, was an implicit aspect of the settlement of the inter-

¹⁴⁰ Dickson (n 29) 150-151.

¹⁴¹ *Cyprus v Turkey* (I) and (II) (n 116) Separate opinion of Mr M.A. Triantafyllides; Professor Dr. Bülent Daver's dissenting opinion. See also, for example, the dissenting opinion of Judge Gölcüklü in the case of *Loizidou*, who 'disagree[d] with the majority on all points' (*Loizidou v Turkey* (n 25)).

¹⁴² *Georgia v Russian Federation* (I) (n 17) Dissenting opinion of Judge Dedov; Partly dissenting opinion of Judge Tsotsoria.

¹⁴³ By way of another example, see the dissenting opinions of Judges Gyulumyan and Hajiyev in *Chiragov v Armenia* (n 26) and *Sargsyan v Azerbaijan* (n 27).

¹⁴⁴ This is despite the fact that, as commentators have pointed out, there is much more of a 'power balance' between the parties in inter-state applications than in individual cases: H Keller, M Forowicz & L Engi, *Friendly Settlements before the European Court of Human Rights – Theory and Practice* (OUP, 2010) 7,74. The first two inter-state cases, brought by Greece against the UK relating to its colonial rule over Cyprus, were discontinued in 1959 when the two states concluded political negotiations over the future status of Cyprus (prior to Cyprus attaining independence in 1960). See *Greece v the United Kingdom* (II) (n 15) (the Commission's report was only made public in 2006: Committee of Ministers, Resolution ResDH(2006)24, 5 April 2006). See further: Simpson (n 15) 1048-1052.

¹⁴⁵ *Denmark, France, Norway, Sweden and the Netherlands v Turkey* (n 23) para 39. The terms of the settlement included the following: 'In the course of the dialogue, the delegates of the European Commission of Human Rights, may comment on the information received. Such comments are of a confidential nature and should be made to the representatives of the Turkish Government only' (para 4).

¹⁴⁶ Kamminga (n 5) 158.

state case,¹⁴⁷ and that the conclusion of the settlement was more important than a judgment finding Turkey to be in violation of the Convention.¹⁴⁸

The later case of *Denmark v Turkey*,¹⁴⁹ in which it was alleged that a Danish citizen was tortured by the Turkish police, led to a more transparent conclusion by way of settlement. Following the Court's admissibility decision in June 1999, the application was quickly concluded by way of a friendly settlement in April 2000. The judgment records that after Mr Koç was allowed to leave Turkey and return to Denmark, he was convicted of assisting the PKK and sentenced to four and a half years' imprisonment. His complaint of ill-treatment led to two police officers being prosecuted, although they were acquitted by the High Criminal Court in 1998. The settlement terms included the payment of 450,000 Danish kroner, the Turkish Government's expression of regret in respect of 'occasional and individual cases of torture and ill-treatment', and Turkey's future involvement in police training (which was partially funded by the Danish Government). By December 2004, the payment had been made and both governments confirmed Turkey's co-operation with a police training programme supported by the Council of Europe and European Commission, as well as plans to continue the training in subsequent years.¹⁵⁰ It is questionable whether such terms truly served the interest of Mr Koç, as it appears that there was no further investigation of his torture allegations. Be that as it may, given the allegation made by the Danish Government that there was a widespread practice of police ill-treatment in Turkey, it is arguable that this approach could have been the most productive way of resolving this complaint, had there been an effective means of monitoring the implementation of the settlement terms. Nevertheless, Turkey's subsequent human rights record, in particular as regards the ill-treatment of detainees, demonstrates the negligible impact of the terms of settlement of this case.¹⁵¹ Michael O'Boyle has suggested that 'if the parties to an inter-state case are keen to settle - the scope for the Court to object is not as strong as in an individual case, because of the political context and pressure'.¹⁵²

9 Urgent actions – the Court's use of interim measures

The invocation of the Court's interim measures mechanism is another feature of inter-state applications and conflict cases. This may be considered unsurprising given in particular the obvious and grave threat to lives which arises in situations of armed conflict. However, the Court is generally

¹⁴⁷ Risini (n 12) 132.

¹⁴⁸ Keller, Forowicz and Engi (n 144) 74.

¹⁴⁹ *Denmark v Turkey* (n 19).

¹⁵⁰ Committee of Ministers, Resolution ResDH(2004)87 concerning the judgment of the European Court of Human Rights of 5 April 2000 (Friendly settlement) in the case of Denmark against Turkey, 9 December 2004.

¹⁵¹ See, for example: Council of Europe, Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 23 May 2017, CPT/Inf (2020) 22, 5 August 2020: <<https://rm.coe.int/16809f209e>> ('In the CPT's view, in a number of cases, the alleged ill-treatment was of such severity that it could be considered as amounting to torture', 4); Council of Europe, Report to the Turkish Government.

on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 17 May 2019, CPT/Inf (2020) 24, 5 August 2020 <<https://rm.coe.int/16809f20a1>> ('As was the case during the CPT's 2017 visit, the delegation received a considerable number of allegations of excessive use of force and/or physical ill-treatment by police/gendarmerie officers from persons who had recently been taken into custody (including women and juveniles). These allegations mainly consisted of slaps, kicks, punches (including to the head and/or face) and truncheon blows after the persons concerned had been handcuffed or otherwise brought under control. A significant proportion of the allegations related to beatings during transport or inside law enforcement establishments, apparently with the aim of securing confessions or obtaining other information, or as a punishment', 3).

¹⁵² Email from Michael O'Boyle to the author, 13 November 2020.

very parsimonious in granting interim measures applications, especially outside the usual extradition or expulsion context.¹⁵³ As Risini has suggested, there remains a question about the legal effect of interim measures in inter-state proceedings, given that the Court's caselaw confirming the binding effect of such directions in individual cases is explicitly predicated on ensuring the effective individual right of petition under Article 34 of the Convention.¹⁵⁴

Two distinct paths have developed in the Court's application of interim measures in the context of conflict. The first involves directing the authorities to take steps to protect individuals held in custody.¹⁵⁵ For example, in the case brought by Ukrainian film director, Oleg Sentsov, relating to his detention in Russia, the Court applied interim measures both to require that he should receive adequate medical care, and also to invite Mr Sentsov to end his hunger strike and accept treatment.¹⁵⁶ In July 2014, in the inter-state case of *Ukraine v Russian Federation* (III),¹⁵⁷ the Court instructed both states to uphold the Convention rights of detained Crimean Tatar leader Mustafa Dzhemilov including, in particular, respect for his personal security and his right to legal assistance. Similar directions have been a feature of individual applications arising from the conflict in eastern Ukraine. In more than 150 of the 1,400 individual cases pending at the Court relating to Crimea and eastern Ukraine, the Court has applied interim measures to require either the Russian and/or the Ukrainian governments to ensure respect for the Convention rights of those still detained, or whose whereabouts were unknown.¹⁵⁸ In response to a series of interim measures requests made by, or on behalf of, individuals captured during the renewed hostilities over Nagorno-Karabakh in September 2020, the Court asked the governments to confirm whether the person had been detained, what conditions they were being held in, and the extent of any medical treatment provided.¹⁵⁹

As in other contexts, an application for interim measures may have consequences (intended or otherwise) which go beyond what was sought – including the Court's soliciting of relevant information, which can have significant effects. The case of *Georgia v Russian Federation* (III) concerned four Georgian children who had been taken into custody by the *de facto* regime in South Ossetia. In November 2009, the Georgian Government requested the Court to require the Russian authorities to comply with its obligations under the Convention and ensure the prompt and unconditional release of the children. This led the Court to request further information from the parties, who responded by early December. The Human Rights Commissioner of the Council of Europe made two swift visits to

¹⁵³ In the period 2017 – 2019, the Court granted 405 interim measures applications, out of a total of 4,779 (less than 9%). 2,811 applications (59%) were considered to be outside the scope of rule 39. See: European Court of Human Rights, Rule 39 requests granted and refused in 2017, 2018 and 2019 by respondent State: <https://www.echr.coe.int/Documents/Stats_art_39_01_ENG.pdf>.

¹⁵⁴ Risini (n 12) 139. The leading case is *Mamatkulov and Askarov v Turkey* [GC] 46827/99 & 46951 (ECtHR, 4 February 2005) (holding that Turkey's failure to comply with an interim measures direction violated Article 34 of the Convention).

¹⁵⁵ The very first application of interim measures arose in 1957 during the first inter-state case, brought by Greece against the UK, in which the Sub-Commission requested the UK Government not to carry out a death sentence in respect of journalist Nikos Sampson, who had been convicted of the murder of a British police officer in Cyprus. See Simpson (n 15) 972-973.

¹⁵⁶ European Court of Human Rights, Press Release, 'Court decides on medical care interim measure for Oleg Sentsov, calls on him to end hunger strike', 25 July 2018.

¹⁵⁷ *Ukraine v Russian Federation* (III) (n 33).

¹⁵⁸ European Court of Human Rights, Press Release, 'European Court of Human Rights communicates to Russia new inter-State case concerning events in Crimea and Eastern Ukraine', 1 October 2015.

¹⁵⁹ European Court of Human Rights, Press Release, 'The Court makes a statement on requests for interim measures concerning the conflict in and around Nagorno-Karabakh', 4 November 2020.

the region, and the children were released that same month.¹⁶⁰ Following the detention of 24 Ukrainian sailors by the Russian authorities in the Sea of Azov and Kerch Strait in November 2018, in response to an interim measures request submitted by the Ukrainian Government, the Court put questions to the Russian Government as to the whereabouts of the sailors, the lawful basis of their detention, the extent of any injuries and the medical treatment which they had received.¹⁶¹ Further interim measures were issued a few days later, calling on the Russian authorities to ensure that the captured Ukrainian sailors received appropriate medical treatment.¹⁶²

The second path pursued by the Court has been to direct much more generalised interim measures directions at the parties to conflict. In the midst of the eight day conflict raging in South Ossetia and Abkhazia in August 2008 (the subject of *Georgia v Russian Federation* (II)), the Georgian Government petitioned the Court to require the Russian Federation ‘to refrain from taking any measures which may threaten the life or state of health of the civilian population and to allow the Georgian emergency forces to carry out all the necessary measures in order to provide assistance to the remaining injured civilian population and soldiers via [a] humanitarian corridor’. Egbert Myjer, the then Dutch judge on the Court, has suggested that this was ‘like no other Rule 39 request ever submitted’ and ‘little short of an invitation to the Court to take a stand on ongoing armed hostilities’.¹⁶³ In response, the Court directed both parties to comply with their obligations under the Convention, particularly in relation to Articles 2 and 3.¹⁶⁴

A similar direction was also made in the first inter-state case brought by Ukraine against Russia in 2014, with an additional call to avoid, in particular, ‘military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk’.¹⁶⁵ In September 2020, when hostilities between Armenia and Azerbaijan erupted again over Nagorno-Karabakh, Armenia sought an interim measures indication from the Court which was granted in very similar terms.¹⁶⁶ Furthermore, both states were invited by the Court to inform it, as soon as possible, of the measures taken to comply with their obligations, which, it has been suggested, could have something of a ‘supervisory deterrent effect’.¹⁶⁷ Within a week of that decision, after Armenia claimed that Turkey had shot down one of its fighter jets, the Court made a further interim measures direction, calling on ‘all States directly or indirectly involved in the conflict, including Turkey, to refrain from actions that contribute to breaches of the Convention rights of civilians, and to respect their obligations under the Convention’.¹⁶⁸

It is of course impossible to assess whether such generalised directions have any effect on the ground, and it is not possible for the Court to monitor compliance. Commentators have criticised this approach for its vagueness, which creates difficulties in execution, and in turn strains the Court’s legitimacy, if

¹⁶⁰ *Georgia v Russian Federation* (III) 61186/09 (ECtHR, dec, 16 March 2010) (case struck out after the Georgian Government indicated that it no longer wished to pursue the application).

¹⁶¹ Press Release 30 November 2018 (n 34).

¹⁶² European Court of Human Rights, Press Release, ‘ECHR grants interim measure in new inter-State case brought by Ukraine against Russia concerning events in the Kerch Strait’, 4 December 2018.

¹⁶³ Myjer (n 4) 462.

¹⁶⁴ European Court of Human Rights, Press Release, ‘European Court of Human Rights grants request for interim measures’, 12 August 2008.

¹⁶⁵ European Court of Human Rights, Press Release, ‘Interim measure granted in inter-State case brought by Ukraine against Russia’, 13 March 2014.

¹⁶⁶ Press Release 30 September 2020 (n 36).

¹⁶⁷ Risini I, ‘Armenia v Azerbaijan before the European Court of Human Rights’ (*EJIL: Talk!*, 1 October 2020): <<https://www.ejiltalk.org/armenia-v-azerbaijan-before-the-european-court-of-human-rights/>>.

¹⁶⁸ Press Release 6 October 2020 (n 36). See also: Press Release 4 November 2020 (n 159).

there is non-compliance.¹⁶⁹ Accordingly, it may be questionable whether this second strategy is worth pursuing. Nevertheless, faced with the outbreak of armed hostilities on Council of Europe territory, and the likely catastrophic consequences for the civilian population in the region in question, it is arguably appropriate for the Court to act swiftly in putting a marker down and reminding the parties of their Convention obligations, which of course still continue to apply in conflict situations. Myjer is strongly supportive of the direction given in *Georgia v Russian Federation* (II): ‘the very fact that the Court took this request seriously and reminded *both* High Contracting Parties of their responsibilities under the Convention, gives sense to the decision as such and makes it more than just a pious statement.’¹⁷⁰

Could the Court go further in making its interim measures directions more effective in times of conflict?¹⁷¹ This may depend on other actors being willing to step into the ring, as interim measures may in fact be sought by ‘any other person concerned’,¹⁷² not limited to individual or state applicants (and indeed the Court can also make an interim measures indication of its own motion). Therefore, Rule 39 could be invoked by any Council of Europe state (not necessarily a party to the proceedings) or indeed other international actors (such as the Secretary-General of the Council of Europe¹⁷³ or the Commissioner for Human rights). Humanitarian exigencies could conceivably lead to such an intervention, and encourage the Court to set down more specific, far-reaching measures, but it is likely to exercise caution, as exemplified perhaps by the Court’s decision in the course of the August 2008 South Ossetian conflict to reject a Georgian government request ‘to allow the Georgian emergency forces to carry out all the necessary measures in order to provide assistance to the remaining injured civilian population and soldiers via [a] humanitarian corridor’.¹⁷⁴

10 Wrestling over Redress and Implementation

The question of how to provide suitable redress in the course of inter-state litigation has frequently been beset by legal and practical obstacles. There have been large global awards, but compliance by respondent governments has been poor. It was only in the *Cyprus v Turkey* (IV) just satisfaction judgment in 2014 that the Court confirmed for the first time that Article 41 is applicable to inter-state cases, and accordingly that it is possible to make an award of just satisfaction (depending on the particular circumstances of the case), albeit with the important proviso that ‘it should always be done for the benefit of individual victims’.¹⁷⁵ The Court laid down a threefold test:

- (i) whether the complaint concerns violations of individuals’ human rights (of the state’s own nationals or other victims); and
- (ii) whether the victims can be identified; and

¹⁶⁹ See, for example: K Dzehtsiarou, ‘Can the European Court of Human Rights prevent war? Interim measures in inter-state cases’ (2016) 2 *Public Law* 254; J Koch, ‘The efficacy and impact of interim measures: Ukraine’s inter-state application against Russia’ (2016) 39(1) *Boston College International and Comparative Law Review*, 163.

¹⁷⁰ Myjer (n 4) 472.

¹⁷¹ As to the potential to apply interim measures to ensure the preservation of evidence during ongoing conflicts (linked to the obligation to carry out an effective investigation), see: P Leach, ‘The right to life – interim measures and the preservation of evidence in conflict situations’ in L Early *et al* (eds), *The right to life under Article 2 of the European Convention on Human Rights – twenty years of legal developments since McCann v. the United Kingdom* (Will-Jan van der Wolf, 2016) 171.

¹⁷² Rule 39(1) of the Court’s Rules.

¹⁷³ See, e.g. *Denmark, Norway, Sweden and the Netherlands v Greece* (n 22).

¹⁷⁴ Press Release 12 August 2008 (n 164). See also: *Georgia v Russian Federation* (II) 38263/08 (ECtHR, dec, 13 December 2011) para 5.

¹⁷⁵ *Cyprus v Turkey* (IV) (n 120) paras 40-46.

(iii) the main purpose of bringing the proceedings.

The case of *Cyprus v Turkey* (IV) resulted in a 90 million euro award: 30 million euros for non-pecuniary damages suffered by the relatives of missing persons, and 60 million euros by way of non-pecuniary damages (not concerning property rights) suffered by the enclaved Greek Cypriot residents of the Karpas peninsula. In their concurring opinion, Judges Pinto de Albuquerque and Vučinić suggested that the Court's award constituted punitive damages, which they argued was appropriate and necessary given the commission of a 'multitude of gross human rights violations' and Turkey's deliberate and sustained non-compliance with the merits judgment.¹⁷⁶

By contrast, damages awards will not be made in inter-state cases relating to systemic problems or administrative practices, where the aim of the applicant government is 'vindicating the public order of Europe within the framework of collective responsibility under the Convention'.¹⁷⁷ This is exemplified by the case of *Denmark, France, Norway, Sweden and the Netherlands v Turkey*,¹⁷⁸ following the declaration of martial law in the early 1980s, in which the applicant Governments sought not to represent the interests of individuals, but to highlight Convention violations arising from legislative or administrative practice. Therefore, they did not seek damages.

The Court's three limb test was met in *Georgia v Russian Federation* (I) - damages awards were made on behalf of the Georgian nationals expelled from Russia. However, the identification of the individuals affected was clearly problematic, with the Court criticising both governments for their dilatory and incomplete responses. In the merits judgment, the Court came to a tentative conclusion that there had been 4,600 expulsion orders, leading to the detention and expulsion of about 2,380 Georgian nationals. However, the Georgian government was only able to come up with a list of 1,795 individuals. Of that number, the Court accepted the respondent Government's arguments that 290 should be excluded, because of various reasons: they were included more than once on the list; they had lodged individual applications; they had either acquired Russian nationality or from the outset possessed a nationality other than Georgian nationality; expulsion orders had been issued against them either before or after the relevant period; they had successfully used available remedies; it had not been possible to identify them or their complaints had not been sufficiently substantiated.¹⁷⁹ Therefore, the Court proceeded on the basis that it had a 'sufficiently precise and objectively identifiable' group of 1,500 individual victims, for whom it awarded a lump sum of ten million euros. This sum was to be distributed by the applicant Government to the individuals, in sums ranging between €2,000 and €15,000, within a period of eighteen months. Four judges (Judges Yudkivska, Mits, Hüseyinov and Chanturia) argued that the Court should have used the original figures (4,600 orders and 2,380 expulsions) in order to calculate the Article 41 award. In his dissenting opinion, Judge Dedov decried the failure to include the Russian Government in the distribution of the damages award.

The political contentiousness of the inter-state cases causes no little dissent and confrontational non-compliance by respondent states. In response to the Court's just satisfaction judgment in *Cyprus v Turkey* (IV) in 2014, the then Turkish Foreign Minister, Ahmet Davutoğlu, ventured that the 'ECHR ruling consists of some legal contradictions and therefore we don't see it as at all binding, in terms of

¹⁷⁶ Ibid Concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, paras 12-19. The majority Court did not, however, describe the damages award as being 'punitive'.

¹⁷⁷ *Cyprus v Turkey* (IV) (n 120) para 44.

¹⁷⁸ *Denmark, France, Norway, Sweden and the Netherlands v Turkey* (n 23).

¹⁷⁹ *Georgia v Russian Federation* (I) (n 119) para 70.

payment'.¹⁸⁰ At the last meeting of the Committee of Ministers when this case was on the agenda, in September 2020, there had still be no payment and no information about the prospects of payment, leading the Committee to issue a further reminder to the Turkish authorities of the unconditional nature of the obligation to pay the award.¹⁸¹ In *Georgia v Russian Federation* (I), the deadline for payment by the Russian Government of the ten million euros damages award expired in April 2019, and as at October 2020, no payment at all had been made.¹⁸²

The award of just satisfaction in inter-state cases also raises questions about their inter-relationship with individual cases. If individual victims are referred to by applicant governments, how does that affect any individual application which they may choose to bring? In those circumstances, in order to be able to name them, is the applicant government obliged to obtain the individual's fully informed consent? In EHRAC's experience, there may be a risk of decisions being made in inter-state cases which in fact prejudice the position of the individual – for example, where the individual does not have control of what evidence is submitted by the government in making its just satisfaction claim. Conversely, Dzehtsiarou has suggested that, in cases like *Georgia v Russian Federation* (I), those named as victims by an applicant state have a privileged status over individual applicants, as the government acts as a proxy on their behalf, obviating any need to submit their own application and benefiting from the less strenuous admissibility hurdles which apply to inter-state cases.¹⁸³ He does acknowledge, however, that the risk of non-execution of an inter-state judgment is higher than in individual cases.¹⁸⁴

10.1 Non-monetary measures of redress

Aside from the award of damages, the Court's resolution of inter-state applications and cases arising from armed conflict may require the implementation of other, non-pecuniary measures. Indeed, these may be considerably more far-reaching, and therefore justify the full focus of the Court and the Committee of Ministers. At successive Council of Europe conventions, state parties have paid lip service to the need to redouble efforts in resolving serious, widespread and systemic Convention violations,¹⁸⁵ but such declarations do not reflect states' practice.

For example, Council of Europe states (through the Committee of Ministers) have been utterly negligent in failing to mount a decisive, collective response to the Court's 2015 Grand Chamber

¹⁸⁰ 'Turkey won't pay Cyprus despite decision in Strasbourg', Deutsche Welle, 13 May 2014: <<https://www.dw.com/en/turkey-wont-pay-cyprus-despite-decision-in-strasbourg/a-17631966>>.

¹⁸¹ Committee of Ministers, *Cyprus v Turkey* (No. 25781/94), Decision, 1377bis meeting (1-3 September 2020).

¹⁸² Committee of Ministers, Decisions, CM/Del/Dec(2020)1383/H46-16 (*Georgia v. Russia* (I) (Application No. 13255/07), 1 October 2020).

¹⁸³ The admissibility criteria set out in Articles 35(2) and (3) of the Convention apply only to individual applications, not to inter-state cases.

¹⁸⁴ K Dzehtsiarou, 'Compensation for victims in inter-state cases. Is *Georgia v Russia* (I) another step forward?', (*Strasbourg Observers*, 14 February 2019): <<https://strasbourgobservers.com/2019/02/14/compensation-for-victims-in-inter-state-cases-is-georgia-v-russia-i-another-step-forward/>>.

¹⁸⁵ For example, at Interlaken, the states parties invited the Committee of Ministers 'to strengthen this supervision by giving increased priority and visibility not only to cases requiring urgent individual measures, but also to cases disclosing major structural problems' (Interlaken Declaration (n 59) Action Plan, para 11). In Brighton in 2012, states declared that '[t]he Committee of Ministers should be able to take effective measures in respect of a State Party that fails to comply with its obligations under Article 46 of the Convention. The Committee of Ministers should pay particular attention to violations disclosing a systemic issue at national level, and should ensure that States Parties quickly and effectively implement pilot judgments' (Brighton Declaration (n 61) para 27). They also pronounced that 'the Court should be in a position to focus its efforts on serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention' (Brighton Declaration (n 61) para 33).

judgments relating to Nagorno-Karabakh. In the two parallel decisions targeted at both Armenia and Azerbaijan, the Court acknowledged the primacy of a political resolution: '.... it is the responsibility of the two States involved in the conflict to find a political settlement of the conflict.... Comprehensive solutions to such questions as the return of refugees to their former places of residence, re-possession of their property and/or payment of compensation can only be achieved through a peace agreement'.¹⁸⁶ Nevertheless, the Court went further, in proposing a specific, limited way forward - by establishing a means of redress for those who had lost their homes and land as a result of the conflict:

...it would appear particularly important to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicant and others in his situation to have their property rights restored and to obtain compensation for the loss of their enjoyment.¹⁸⁷

More than five years later, neither state has taken any tangible efforts whatsoever to comply, and the Committee of Ministers has apparently failed to exert any pressure or take any steps to encourage or facilitate positive responses from the two states. Through the Court's resolution of these two cases, the Council of Europe took on a new obligation vis-à-vis the Nagorno-Karabakh conflict, namely to ensure the implementation of judgments which are binding in international law, yet little or nothing has been attempted in relation to the two cases. Indeed, amongst commentators on the region, the Council of Europe is not perceived to have a role. Thomas de Waal, has warned of the risk of a dangerous conflict spilling over into the wider region if international actors do not respond robustly. He discusses the respective roles of the OSCE Minsk process (co-chaired by France, Russia and the United States), the United Nations and the European Union, but he makes no mention of the Council of Europe.¹⁸⁸ The renewed outbreak of armed conflict between Armenia and Azerbaijan in the Autumn of 2020 only serves to underline the gravity and urgency of the situation, and the need for Council of Europe states to act.

11 Conclusion

Inter-state litigation has been making something of a comeback in recent years, a reflection, primarily, of long-standing and ongoing conflict between European states, causing misery for the hundreds of thousands of Europeans affected, whose rights have been grossly violated. This article has shown that inter-state and individual cases are frequently closely inter-related, and more consideration needs to be given to how such connected cases are processed by the Court, for example by affording some individual applications the same precedence as inter-state cases. Those leading cases could then be treated akin to pilot judgments, establishing precedents at an earlier stage, to which the remaining litigation would be subject.

¹⁸⁶ *Sargsyan v Azerbaijan* (n 27) para 216.

¹⁸⁷ *Chiragov and Others v Armenia* (n 26) para 199; *Sargsyan v Azerbaijan* (n 27) para 238. Such a direction has a comparable precedent – concerning the property claims relating to northern Cyprus. In its 2005 judgment in *Xenides-Arestis v Turkey* 46347/99 (ECtHR, 22 December 2005) the Court directed the Turkish government to introduce a mechanism of redress for property claims (within three months), which led to the establishment of the Immovable Property Commission (IPC) (whose composition included a former Secretary General and Deputy Secretary General of the Council of Europe). Subsequently, in its decision in 2010 in *Demopoulos and Others v Turkey* [GC] 46113/99 (ECtHR, dec, 1 March 2020) the Grand Chamber found that the IPC provided an accessible and effective framework of redress.

¹⁸⁸ T de Waal, 'Prisoners of the Caucasus: Resolving the Karabakh Security Dilemma' (Carnegie Europe, 16 June 2016): <<https://carnegieeurope.eu/2016/06/16/prisoners-of-caucasus-resolving-karabakh-security-dilemma-pub-63825>>.

Amidst such bitterly-contested disputes, the assessment of evidence will be one of the most significant challenges for the Court. The long-established and proven practice of holding fact-finding hearings or investigations needs to be rejuvenated. As well as hearing witnesses in Strasbourg, on site missions should also be carried out, where it is feasible, with attention given to the ways in which the safety and security of the parties and witnesses can be ensured. The many ways in which technology can enhance the fact-finding process need to be thoroughly embraced, allowing witnesses to be heard online and large volumes of evidence to be gathered and objectively assessed. New scientific techniques can be employed to help establish what happened even many years after the event.

The excessive delays associated with inter-state litigation must be tackled. This can be approached in part through tightening up the Court's processes – by laying down tighter timescales, adopting rules limiting the volume of submissions and documents and adopting clear consequences for states' non-co-operation (including the drawing of inferences). The stridently divergent opinions which are all too often expressed by Court judges whose states are parties to inter-state proceedings are likely to be damaging to the reputation of the Court - this justifies adopting a rule to exclude such judges from the proceedings (while still permitting Court registry lawyers from the states concerned to participate). Interim measures directions in conflict situations serve a potentially useful declaratory and symbolic purpose, but further assessment could be made of the recent tendency to issue generic directions to states – for example, to consider what follow up or monitoring measures could subsequently be pursued. Finally, given the magnitude and significance of this body of cases, their effective implementation should become a much greater priority for the Committee of Ministers, and further creative thought is needed to consider how the supervision process can be enhanced and made more transparent.

It is very welcome that any suggestion of 'side-lining' conflict-related cases (as was initially proposed during the Copenhagen negotiations) has long since been discarded. This article has sought to elucidate the centrality and significance of inter-state litigation, and conflict-related cases in particular, within the Strasbourg system, ever since the 1950s. Very recent signs indicate that states are tending to turn more and more frequently to the Court for legal resolution of issues which they face – a development which underlines support for an international rules-based system. The legitimacy of the system would be further enhanced, however, were states to show willingness to confirm the need for collective action, by bringing inter-state applications for the wider purpose of 'policing' compliance with the Convention more generally. At the heart of the Strasbourg process remains the right of individual petition, which, as this article has shown, is supplemented and supported by inter-state litigation. The plight of the thousands of individual victims in the situations and cases discussed in this article, and that of future victims too, necessitates the maintenance and development of an effective European system for the enforcement of universal human rights standards.